82-204

Office - Supreme Court, U.S.
FILED
AUG 5 1982
ALEXANDER L. STEVAS,
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

D. L. ORDERS, W. R. WILKINSON, JACKIE PARMINTER, WARNER C. USELTON, JR., JACK PESGROVE, HAROLD WALLACE, HARVEY JENKINS, FRED E. PERSON, JR., PRESTON LEE DUNN, CHARLEY JONES, JOHN W. BLANTON, FOR THEMSELVES AND ALL OTHER NON-MINORITY EMPLOYEES OF THE MEMPHIS FIRE DEPARTMENT, SIMILARLY SITUATED,

PETITIONERS,

V.

CARL W. STOTTS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, FRED JONES, AND MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS, JOSEPH SABATINI,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In a race discrimination suit by minority employees against their employer, when does the employer's interest become adverse to the interests of non-minority employees so as to render the employer's representation of non-minority employee interests inadequate and trigger the right of the non-minority employees to intervene under Rule 24 of the Federal Rules of Civil Procedure?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	...1
OPINIONS BELOW	...1
JURISDICTION	...2
STATUTORY PROVISION INVOLVED	...2
STATEMENT OF THE CASE	...3
Introduction	...3
Statement of Facts	...5
The District Court Decision	...12
The Court of Appeals Decision	...14
REASONS FOR GRANTING THE WRIT	...16
I. Non-minority Employees Have an Absolute Right to Intervene to Represent Their Interests in Any Settlement of an Employment Discrimination Suit Brought by Minority Employees.	...18
II. A Defendant-Employer Cannot Adequately Represent Non-minority Employee Interests in the Settlement Stage of an Employment Discrimination Suit Because of Adverse Interests.	...25
III. Timeliness for the Purposes of Rule 24(a)(2) Begins to Run in an Employment Discrimination Suit When Representation Becomes Inadequate.	...32

CONCLUSION ...51

APPENDIX (Separately presented):

Page

A. Opinion of the Court of Appeals for the Sixth Circuit, dated May 7, 1982 ...1

B. Consent Decree Entered by the District Court, Western District of Tennessee, dated April 25,1980 ...39

C. Transcript of the Oral Ruling Made by the District Court, Western District of Tennessee, on Petitioners' Motion to Intervene, dated April 25, 1980 ...76

D. Order of the District Court, Western District of Tennessee, Denying Petitioners' Motion to Intervene, dated May 27, 1980 ...80

E. Order of the District Court, Western District of Tennessee, Denying Stay Pending Appeal, dated June 9, 1980 ...87

F. Order of the District Court, Western District of Tennessee, Modifying 1980 Consent Decree, dated June 28, 1982 ...89

TABLE OF AUTHORITIES

	Page
Federal Cases:	
Afro American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974)	...22 26
Alaniz v. California Processors, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), aff'd, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978)	...21,22
Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975)	...29
Baker v. City of Detroit, 504 F.Supp. 841 (E.D. Mich. 1980)	...40
Blanchard v. Johnson, 532 F.2d 1074 (6th Cir.), cert. denied, 429 U.S. 834 (1976)	...26
Bolden v. Pennsylvania State Police, 578 F.2d 912 (3d Cir. 1978)	...26,48
Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975)	...30,31
Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967)	...25,44
Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980)	...32,35
Detroit Police Officers' Association v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981)	...31

Edmondson v. Nebraska ex rel. Meyer, 383 F. 2d 123 (8th Cir. 1967) ...26

EEOC v. AT&T Co., 506 F.2d 735 (3d Cir. 1974) ...21,44

Firebird Society of New Haven, Inc. v. New Haven Board of Fire Commissioners, 66 F.R.D. 457 (D.Conn.), aff'd, 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 887 (1975) ...22

Franks v. Bowman Transporation Co., 424 U.S. 747 (1976) ...23,24

Hodgson v. United Mine Workers of America, 473 F.2d 118 (D.C. Cir. 1972) ...44

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ...20

Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1976), cert. denied, 425 U.S. 993 (1976) ...40,50

Metropolitan Housing Development Corp. v. Village of Arlington Heights, 469 F.Supp. 836 (N.D.Ill. 1979), aff'd, 616 F.2d 1006 (1980) ...18

Michigan Association for Retarded Citizens v. Smith, 657 F.2d 102 (6th Cir. 1981) ...23,36,41

Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1978) ...28

NAACP v. New York, 413 U.S. 345 (1973) ...33,34

Nevilles v. EEOC, 511 F.2d 303 (8th Cir. 1975) (per curiam) ...32

Neusse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) ...26

Penick v. Columbus Education Association, 574 F.2d 889 (6th Cir. 1978) ...38,39

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979) ...28

Piambino v. Bailey, 601 F.2d 1306 (5th Cir.), cert. denied, 449 U.S. 1011 (1980) ...40

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ...30

Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977) ...25,32,33,34,35,36,37

Stotts v. Memphis Fire Department, 679 F.2d 541 (6th Cir. 1982) ...45,46,47

Stotts v. Memphis Fire Department, 679 F.2d 579 (6th Cir. 1982) ...1,14,15,16,45

Stotts v. Memphis Fire Department, Nos. 77-2104, 79-2441-M (W.D. Tenn. filed May 27, 1980) ...1,12,13,14,39,42

System Federation No. 91 v. Reed, 180 F.2d 991 (6th Cir. 1950) ...44

Trbovich v. U.M.W., 404 U.S. 528 (1972) ...26

United Air Lines v. McDonald, 432 U.S. 385 (1977) ...33,34,37,42

United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1 (N.D. Ala. 1974), aff'd, 517 F.2d 826 (5th Cir. 1975) cert. denied, 425 U.S. 944 (1976) ...21

United States v. City of Miami, Florida, 614 F.2d 1322 (5th Cir. 1980) ...20,21

United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972) ...48

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) ...16,19,24,31,32

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e et seq. ...4,5,28

Federal Rules of Civil Procedure:

Rule 24 ...1,2,3,13,17,18,19,24,26,32,35,36,38

Other Authorities:

Abt, Consent Decrees: Can They Withstand the Charge of Reverse Discrimination?, 19 Santa Clara L. Rev. 115 (1979) ...49

Jones, Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action, 14 Harv. Civ. Rights - Civ. Lib. L. Rev. 31 (1979) ...33

Note, The Timelines Threat to Intervention of Right, 89 Yale L. J. 586 (1980) ...36

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

D. L. Orders, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTION PRESENTED

In a race discrimination suit by minority employees against their employer, when does the employer's interest become adverse to the interests of non-minority employees so as to render the employer's representation of non-minority employee interests inadequate and trigger the right of the non-minority employees to intervene under Rule 24 of the Federal Rules of Civil Procedure?

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Tennessee is not published but is reprinted as Appendix D to this petition. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 679 F.2d 579 (6th Cir. 1982) and is reprinted as Appendix A to this petition.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on May 7, 1982 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Rule 24 of the Federal Rules of Civil Procedure states in pertinent part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or

defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its di cretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

Introduction

Petitioners are a group of eleven white employees of the Memphis Fire Department, informally called "Firefighters for a More Appropriate Remedy". They petitioned for leave to intervene "on behalf of themselves and all other non-minority employees of the Memphis Fire Department, similarly situated", in a class action brought by black firefighters. The black firefighters' suit alleged racial

discrimination in the Fire Department's hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); 42 U.S.C. §1981 and 42 U.S.C. §1983. Soon after petitioners learned that their employer, the defendant City Fire Department, had agreed to settle the case by consent decree, they sought intervention for the limited purpose of shaping a less burdensome remedy than the remedy proposed in the consent decree.

Both the minority class representatives and the City Fire Department opposed intervention. On May 16, 1980, the district court denied petitioners' motion as untimely. Petitioners challenged denial of their motion, which they had filed before the

district court had finally approved the consent decree, but a sharply divided court of appeals affirmed the district court decision on May 7, 1982. Petitioners seek review by this Court because they believe that they, and all non-minority employees, are entitled to adequate representation in settlements of racial discrimination in employment suits and that immediate review is important to the national interest.

Statement of Facts

On November 27, 1974, the United States Department of Justice and the City of Memphis entered a consent decree which terminated a suit brought by the Attorney General to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. In the 1974 decree, the City denied the government's charges of past sex and race

discrimination, but agreed to establish goals for hiring more blacks and women in numbers "approximating [their] respective proportions in the civilian labor force". As an interim goal, the City also promised to attempt to fill at least fifty percent of all City vacancies with qualified black applicants. The decree applied to various City agencies, including the Fire Department.

On February 16, 1977, Carl Stotts, a black Captain, sued the Fire Department, alleging that he and other similarly situated blacks had been denied promotions because of their race. After discovery had been taken, the district court certified the Stotts suit as a class action. On June 19, 1979, Fred Jones, a black Private, brought an individual action against the Fire Department, alleging that the Department

had not promoted him to Fire Inspector because of his race.

Three months after Jones filed his complaint, the district court consolidated the two Fire Department cases for trial. In December of 1979, the plaintiffs requested and received an order temporarily restraining all imminent promotions of blacks and whites in the Department's Fire Prevention Bureau, to prevent "irreparable injury" to black employees. Nineteen promotions in the Bureau were postponed until February 7, 1980, a tentative trial date.

The case did not go to trial on February 7 and the litigants informed the district court on February 25, 1980, that they were negotiating the terms of a consent decree to settle their dispute. Two months later, the court held a hearing and conditionally approved a proposed agreement submitted by the Fire

Department and the black firefighters. The district court ordered the parties to post a copy of the proposed settlement in each City firehouse until May 12, 1980, to allow class members fifteen days in which to review its contents and to file any objections with the court. At this hearing the court asked counsel for the Department whether he expected anyone to object to the decree. Counsel replied that the firefighters' union might object.

No objections were filed by class members or the union within the fifteen-day period. However, on May 12, 1980, petitioners filed their motion to intervene in their own right and as representatives of non-minority employees. Petitioners feared that the proposed decree threatened their interests because the Department had agreed to institute an affirmative action

plan whereby twenty percent of all future promotions would be filled by minority employees.

On May 16, 1980, the district court held a hearing at which petitioners stated their case for intervention. They emphasized that they did not object to entry of the decree, nor did they seek to delay implementation of those provisions that remedied any proven past discrimination against black employees. Petitioners challenged the decree only to the extent that it might unnecessarily hamper or foreclose future promotions of qualified white employees. To protect their "important interest" in the matter, petitioners sought intervention as an opportunity to present and explore alternative remedies that would place the burden of remedying any past discrimination on the wrongdoer - the Fire Department - rather than on innocent

non-minority employees. One possible remedy advanced by petitioners to distribute the burden more equitably was front pay and constructive promotion for white firefighters. Petitioners also suggested monetary relief or Department reorganization as alternatives which might prove less burdensome. The only immediate relief petitioners requested was postponement of the twenty percent future promotions provision at least until its adverse impact on non-minority firefighters could be examined and less burdensome alternative remedies could be explored.

Petitioners also argued that their motion was timely, because they filed it only two weeks after they first learned that the Department had negotiated a settlement which would impair their interests and those of all other non-minority firefighters. Until petitioners

saw the notices posted in the firehouses, they had no indication that the Department was no longer "hotly contesting" the litigation. All eleven applicants stated that they were never formally notified about either the underlying litigation or the settlement negotiations. As proof that the Department inadequately represented their interests, both by deciding to settle the case and in drafting the substantive provisions of the consent decree, petitioners offered several affidavits which revealed that the City Attorney admitted to them that the case was settled simply to save the City money.

At the hearing on the motion to intervene, both the Department and the plaintiffs voiced their opposition to the proposed intervention. The district court denied the motion.

The District Court Decision

In denying the motion to intervene, the district court made the following observations:

> [O]ne of the factors is whether it is going to delay the relief that will be achieved by trial or settlement or whatever it is, and this case has had a good bit of impact on the Fire Department. I have issued some injunctive relief that the City has -that has caused the City to appear in court and assert to the court that necessary promotions in the Fire Department were being held up because of this litigation . . . . and also I think that there is a good bit of value to be obtained, certainly as far as the minority people, of going ahead and getting this thing over with.
>
> Now I don't care when we do it. Somebody is going to be unhappy. And I would not be a party to any of this constructive promotion bit. That's not much good for anybody. And it is certainly not good -well, that's no way to run a fire department, and to create more top jobs is no solution. I think this relief is only a goal to be attempted,

> and it's not any ironclad requirement, and I think it is long overdue. I don't believe it would be right to let someone come in at the last minute and intervene with the implementation of this. I might also observe that I think the provisions of the consent decree are reasonable, and therefore, on the merits I see no great need to let somebody intervene.

(Appendix C, pp. 77-79).

The district court supplemented its reasons for denying intervention in a subsequent memorandum. (Appendix D, pp. 80-86). The court at all times treated the motion as one for intervention as of right under Rule 24(a)(2), and found that it was untimely because the suits had been pending for almost three years. In addition, the court reasoned that because "all promotions have been stayed since 12/5/79", petitioners have been "on notice of the pendency of [the] actions at least since that time." The court rejected the argument that timeliness

should be measured from the date the applicants for intervention first learned that a settlement was contemplated which would harm their interests. It found that "the intervenors adopted a 'wait-and-see' posture with respect to this litigation and [they] have waited too long to come forward." (Appendix D, pp. 82-85).

The Court of Appeals Decision

Petitioners appealed the district court decision and a divided Court of Appeals for the Sixth Circuit affirmed on May 7, 1982. The majority (Judge Keith joined by District Court Judge Robert M. Duncan, sitting by designation) held that the district court "afforded the proposed intervenors a full opportunity to air their objections to the 1980 decree," that the district court fully considered

alternatives to the promotion provision of the 1980 decree and rejected them as "substantively unavailable as a matter of law," and that the district court correctly ruled petitioners' motion to intervene was untimely. (Appendix A, pp. 2-13).

In a strong dissent, Judge Martin declared that the petitioners satisfied the requirements for intervention under Rule 24(a)(2) for the following reasons: (1) the white firefighters had an interest in the subject matter of the consent decree; (2) the promotional goals of the consent decree impaired this interest; and (3) the Fire Department failed to adequately represent petitioners' interest in the settlement negotiations and consent decree. Furthermore, Judge Martin determined that the district court erred in denying petitioners' motion to intervene as

untimely because it "measured promptness by an incorrect legal standard." (Appendix A, pp. 14-38).

REASONS FOR GRANTING THE WRIT

According to United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979), an affirmative action plan designed to remedy past discriminatory employment practices must not "unnecessarily trammel the interests of the white employees" involved. This Court in the Weber decision, however, reserved the right to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." Id. The present case raises questions of great importance which this Court has not addressed and which urgently need resolution concerning the meaning of the Weber standard and the

meaning of Rule 24(a)(2) as applied to employment discrimination cases. The majority opinion below in effect authorizes an employer to settle an employment discrimination suit by entering into an agreement with minority employees which seeks to rectify the employer's past discriminatory practices at the expense of innocent non-minority employees' interests in future promotional opportunities. In addition, the court of appeals' decision encourages settlement of employment discrimination suits without the participation of all interested parties, particularly non-minority employees, in fashioning an appropriate remedy for past discrimination. Petitioners submit that this ruling is incorrect.

1. **Non-minority Employees Have an Absolute Right to Intervene to Represent Their Interests in Any Settlement of an Employment Discrimination Suit Brought by Minority Employees.**

Although third parties do not have an absolute right to block entry of a consent decree, they are entitled to be heard and their views are entitled to careful consideration when the original parties file a consent decree and third party rights may be abridged by the entry of such a decree. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 469 F.Supp. 836, 852 (N.D. Ill. 1979), aff'd, 616 F.2d 1006 (1980). Under Rule 24(a)(2), an applicant shall be permitted to intervene in an action:

> [1] when [he] claims an interest relating to the property or transaction which is the subject of the action, [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, and [3] unless [his] interest is adequately

represented by existing parties.

Petitioners in the instant case do not seek veto power over the entry of a consent decree between an employer and minority employees, but merely seek the opportunity to participate in fashioning an appropriate remedy providing equitable relief for race discrimination against blacks and to ensure the remedy will not "unnecessarily trammel the interests of the white employees". Weber, 443 U.S. at 208.

Clearly, petitioners have an interest in the subject matter of an employment discrimination action brought by minority firefighters. Although petitioners do not have a vested right to rank order selection for promotions in a particular manner or sequence, unless such an order is guaranteed by a collective bargaining agreement or by

contract, they do have an interest in protecting their promotional opportunities within the Department. This Court has recognized that non-minority employees enjoy legitimate expectations of seniority and promotions which the courts must balance against the interests of minorities in Title VII cases. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 357-76 (1977).

As the Fifth Circuit Court of Appeals recently pointed out in United States v. City of Miami, Florida, 614 F.2d 1322, 1342 (5th Cir. 1980), negotiation and compromise among all affected parties and persons provide the best hope for elimination of discrimination. Therefore, in the negotiation of a settlement of an employment discrimination suit brought by minority employees, non-minority

employees should be given "every opportunity to demonstrate that the agreement unduly burdens the interests of white employees, and to propose alternatives which are less burdensome." Id.

In keeping with the emphasis on negotiation and compromise, several courts have even permitted intervention after the entry of a consent decree in employment discrimination suits to allow those parties adversely affected by the decree to voice their views as to the propriety of the relief afforded by the decree. See, e.g., EEOC v. AT&T Co., 506 F.2d 735 (3d Cir. 1974); Alaniz v. California Processors, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), aff'd, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978); United States v. Allegheny-Ludlum Industries, 63 F.R.D. 1 (N.D. Ala. 1974),

aff'd, 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

Denial of intervention on the grounds that sufficient consideration was given to the would-be intervenors is appropriate only when some existing party, other than the employer, adequately represents non-minority interests in the litigation and settlement of an employment discrimination suit. See, e.g., Afro American Patrolmen's League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974) (the court had already permitted fifteen non-minority patrolmen to intervene); Alaniz v. California Processors, Inc., 73 F.R.D. at 295 (the union representing non-minority interests was already a party to the suit and non-minority representatives participated fully in six days of settlement hearings); Firebird Society of New Haven, Inc. v. New Haven Board of

Fire Commissioners, 66 F.R.D. 457 (D. Conn.), aff'd, 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 867 (1975) (seventeen non-minority employees had already intervened).

In the present case, there was no other party in the suit which could provide adequate representation of the legitimate interests of non-minority employees in future promotional opportunities. By denying petitioners' motion to intervene, the district court refused to recognize the absolute right of non-minorities to be represented in the settlement of discrimination suits and to be given an opportunity to propose less burdensome alternatives. In his concurring and dissenting opinion in Franks v Bowman Transportation Co., Justice Burger appropriately objected to the practice of allowing discrimination to be shifted from one group of innocent

employees to another group of equally innocent employees as "robbing Peter to pay Paul". 424 U.S. 747, 781 (1976). Clearly, Weber's directive that an affirmative action plan must not "unnecessarily trammel the interests of the white employees" will be rendered meaningless unless non-minority employees have an absoute right to intervene to protect their interest from impairment in employment discrimination suit settlements.

Petitioners in the lower courts also satisfied the second requirement of Rule 24(a)(2) by demonstrating that the consent decree "may as a practical matter impair or impede" their ability to protect their interests. Since a consent decree approved by the court which includes a twenty percent promotional goal is immune from collateral attack by non-minority employees, an absolute right

to participate in the drafting of such a consent decree would afford the only chance for non-minority employees to vindicate their interests. See generally Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967); Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977).

II. A Defendant-Employer Cannot Adequately Represent Non-minority Employee Interests in the Settlement Stage of an Employment Discrimination Suit Because of Adverse Interests.

Some doubt exists whether the applicant for or opponent of intervention bears the burden of proving or disproving inadequate representation under the third

requirement of Rule 24(a)(2).[1] At any rate, the applicant's burden is "minimal". Trbovich v. U.M.W., 404 U.S. 528, 538 n.10 (1972). An applicant for intervention as of right fulfills the requirement by showing that representation of his interest may be inadequate. Id.

Generally, a state, or governmental body or officer, is presumed to adequately represent the interests of its citizens. See Bolden v. Pennsylvania State Police, 578 F.2d 912, 923 (3d Cir. 1978). However, when the state acts in a proprietary role, different considerations apply. When the state is

1. Compare Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) (burden on opponents to show adequate representation) with Blanchard v. Johnson, 532 F.2d 1074, 1077 (6th Cir.), cert. denied, 429 U.S. 834 (1976); Afro Am. Patrolmen's League, 503 F.2d at 298; Edmondson v. Nebraska ex rel. Meyer, 383 F.2d 123 (8th Cir. 1967) (inadequacy is a necessary element movant must show).

sued in its private capacity as an employer, it makes little sense to presume that it adequately represents the interests of its adversaries, namely its employees. In the context of an employment discrimination suit wherein an employer may be forced to make large concessions to one group of employees at the expense of another, all employees are potential adversaries. In the instant case, the Fire Department's interests were not clearly adverse to those of the white firefighters until the Department began to negotiate and ultimately signed a consent decree. At this juncture, the presumption of adequacy vanished.

Clearly, the defendant employer in this litigation not only could not, but did not, adequately represent the incumbent non-minority employee interests because the record in this case does not even support the entry of a consent

decree establishing promotion goals. Before a court can grant any relief in a Title VII suit, it must find that the defendants engaged in the unlawful employment practice alleged in the complaint. Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1978) (citing 42 U.S.C. §2000e-5(g)). As the court noted in Myers:

> There is an important reason for distinguishing between past and present discrimination, for different remedies are involved. Backpay is the remedy for past wrongs; injunctive and other equitable relief is the remedy for continuing wrongs.

544 F.2d at 854 (emphasis added) (citing Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979)).

The district court in its order denying the motion to intervene in the instant case made no findings of past and continuing discrimination in promotions

to warrant the equitable relief imposed and Title VII does not allow preferential promotion to individuals not shown to be victims of past discrimination. Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Therefore, the district court erred in granting class-based relief to persons who are not identifiable victims of specific discrimination. This error was in part due to the inadequate representation of petitioners' interest.

Although the court may consider a twenty percent minority promotional goal to have less impact on non-minority employees than a "quota", every incumbent non-minority employee who is passed over for a position which he would have received prior to the implementation of the consent decree goals will be placed at a disadvantage in all future promotions, in pension rights, and in all

future matters affecting his career, including his compensation. This impact can only result in adverse effects upon the morale of the Fire Department, a factor considered important by the court in Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333, 1341 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1978).

As Justice Powell stated in Bakke, "[w]hether [the] limitation is described as a quota or goal, it is a line drawn on the basis of race and ethnic status". The label is a "semantic distinction" which is "beside the point"; the "good faith" requirement eliminates any distinctions. Regents of the University of California v. Bakke, 438 U.S. 265, 289 (1978). The impact of promotion goals, like quotas, is harsh and can only exacerbate rather than diminish racial attitudes among non-minority employees

who have embarked on a fire department career with the expectation of advancement only to be thwarted because of their race. See Bridgeport Guardians, 482 F.2d at 1341.

As the Sixth Circuit Court of Appeals pointed out in Detroit Police Officers' Association v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) the district court must consider the factors enumerated in the Weber opinion in ruling in employment discrimination cases. Petitioners submit that the full extent of the hardship to be borne by non-minority employees in this case could not be and was not determined prior to the entry of the consent decree because of the inadequate representation of petitioners' interests. Such a determination must be made in order to meet the Weber standard, that is, to insure that "the plan does not

unnecessarily trammel the interests of the white employees" (emphasis added).

III. Timeliness for the Purposes of Rule 24(a)(2) Begins to Run in an Employment Discrimination Suit When Representation Becomes Inadequate.

Not only must an applicant meet the requirements of interest, impairment, and lack of adequate representation, but the applicant also must file a motion to intervene in a timely manner under Rule 24(a)(2). Four critical factors govern the timeliness inquiry:[2]

1. Initially a court must consider the length of time that an applicant either knew or reasonably should have known of his interest in the

---

2. Although the Eighth Circuit in Nevilles v. EEOC, 511 F.2d 303 (8th Cir. 1975) (per curiam), has advanced an alternative timeliness test, the Stallworth test with its four factors, is appropriate. Accord, Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980).

case, before he sought to intervene. United Air Lines v. McDonald, 432 U.S. 385 (1977); Michigan Association for Retarded Citizens v. Smith, 657 F.2d 102 (6th Cir. 1981); Stallworth v. Monsanto Co., supra. In NAACP v. New York, 413 U.S. 345 (1973), the Court suggested that promptness can be measured from the time a proposed intervenor learns that litigation is pending.[3]

3. See 413 U.S. at 366. Although NAACP could be read to suggest a different triggering date, that opinion has been described as "subgeneris", largely because of the urgency of expediting the case due to an impending primary election, and because of the NAACP's ability to renew its motion at a later time. Jones, Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action, 14 Harv. Civ. Rights. - Civ. Lib. L. Rev. 31, 82 (1979). Justice Brennan's dissent in NAACP also suggests the limited scope of the decision: "The case plainly turns on its facts, and its impact on the development of principles governing intervention will doubtless be small." 413 U.S. at 373.

However, as the Fifth Circuit points out in Stallworth, supra, the Supreme Court in United Air Lines, supra, a more recent opinion than the NAACP v. New York decision, measured promptness from the time the applicant first learned that her interests "would no longer be protected by the named class representatives", rather than from the time she first learned of the lawsuit. Stallworth, 558 F.2d at 264. Knowledge that litigation is pending is pertinent to Rule 24's timeliness requirement only when its acquisition coincides with an applicant's realization that his interests are threatened and unprotected by existing parties.

2. A court must also consider whether the existing parties will suffer prejudice from an applicant's

"failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case". Id. Culbreath v. Dukakis, 630 F.2d 15, 21 (1st Cir. 1980); Stallworth, 558 F.2d at 65. The prejudice inquiry is narrow; only that prejudice attributable to a movant's failure to act promptly may be considered. The broader factor of prejudice that may flow from the intervention itself does not weigh in the balance. A broad examination of prejudice is appropriate only when a court considers a motion for permissive intervention under Rule 24(b), which expressly directs the court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties".

See Note, The Timeliness Threat to Intervention, 89 Yale L. J. 586 (1980). Rule 24(a)(2) does not contain similar language and should not be interpreted in a similar way.

3. The third factor a court must consider is whether the applicant will be harmed if he is not allowed to intervene. Stallworth v. Monsanto Co., supra. Principles of basic fairness should guide a court in determining whether an applicant should have an opportunity to be heard.

4. Fourth, a court must evaluate any unusual circumstances militating either for or against intervention. Michigan Association for Retarded Citizens v. Smith, supra. In Retarded Citizens Judge Phillips stated a court should also consider

> the purpose for which intervention is sought. This purpose may, in a given case, tip the balance in favor of timeliness.

With regard to the first factor to be considered under the timeliness inquiry, the court of appeals held that time starts to run against an applicant when he first learns of the proceedings. The Fifth Circuit rejected this very rule for fear that it

> . . . would encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is correspondingly high . . . Such a rule would also mean that many individuals who excusably failed to appreciate the significance of a suit at the time it was filed would be barred from intervening to protect their interests when its importance became apparent to them later on.

Stallworth, 558 F.2d at 265. See also United Air Lines v. McDonald, 432 U.S. at

394 n.15. The district court in the instant case rejected petitioners' assertions that the consent decree: (1) notified them for the first time that their interests were threatened and not adequately represented; and (2) triggered their right to intervene. The district court incorrectly measured timeliness from the moment the petitioners could have learned that the lawsuit was pending. Such a rule is unsound and unfair for two reasons. First, it is so conjectural that it is meaningless. Any applicant who moved to intervene in a proceeding asserting a possibility that his interests might be affected by some aspect of a future judgment would face an uphill battle indeed to satisfy Rule 24(a)(2)'s interest, inadequacy, and impairment requirements. The Rule requires a showing beyond a merely speculative interest. See, e.g., Penick

v. Columbus Education Association, 574 F.2d 889 (6th Cir. 1978). Second, petitioners are concerned only with the fairness and operation of the twenty percent goal, which first surfaced publicly when the consent decree was published on April 25, 1980.

The record does not support the district court's comment that petitioners "adopted a wait-and-see posture". (Appendix D, p. 85). Petitioners did not learn about the consent decree and the adverse impact of its promotional goals until copies were posted in each firehouse. Nothing in the record shows that petitioners knew about the decree itself, let alone its potential impact on them, before April 25. Therefore, petitioners acted promptly by filing their motion two weeks after they first saw the decree on the firehouse wall.

An agreement to settle bitterly contested litigation by consent decree is in itself an event that will trigger the need and the right to intervene. Generally, it has been held that intervention is timely and permissible even after parties have agreed to settle litigation by decree. In Piambino v. Bailey, 610 F.2d 1306 (5th Cir.), cert. denied, 449 U.S. 1011 (1980), the Fifth Circuit held that a non-party's right to intervene was triggered by the publication of an adverse settlement agreement. In Baker v. City of Detroit, 504 F.Supp. 841 (E.D. Mich. 1980), the court awarded attorneys' fees to a group of black police officers who had intervened in a reverse discrimination suit to protect their interests. Although timeliness was not at issue in Baker, intervention was granted three years after the suit was filed, virtually

on the eve of trial. The lower court decisions in the instant case place an unfair and unjustifiable burden on a potential intervenor to predict the likely outcome of a complex case, well before the issues have crystallized. Furthermore, the lower court decisions deny to unrepresented persons the right to challenge broad remedies which may impinge upon their interests.

As to the second factor to be considered under the timeliness inquiry, the district court erroneously considered the prejudice existing parties would suffer if intervention were allowed. The law in the Sixth Circuit announced in Retarded Citizens, supra, is clear: a judge may consider only that prejudice the original parties would suffer from a proposed intervenor's failure to move promptly after he knew or reasonably should have known that his interests were

threatened. In short, the prejudice inquiry is narrow -- limited to such considerations as the disappearance of evidence and the unavailability of witnesses. United Air Lines v. McDonald, 432 U.S. at 393 n.14. This element of the timeliness inquiry does not permit broad assessments of the fairness to existing parties of the substance of an intervenor's challenge.

The district court failed to examine as required by the third factor under the timeliness inquiry whether, and to what extent, petitioners would be harmed should intervention be denied. The court summarily concluded that the decree "does not necessarily [sic] trammel the interests of non-minorities in promotion". (Appendix D, p. 85). Without more, petitioners can only speculate whether the court implicitly found that they would not be harmed.

Finally, the district court neglected to consider the fourth factor under the timeliness inquiry, that is, whether special circumstances militated either for or against a finding of timeliness. One factor strongly supports petitioners' motion: the limited role they wish to play as intervenors. They did not object to entry of the decree, nor did they try to delay the proceedings. They merely asked to participate in fashioning an equitable system for future promotions that would not shift the entire burden of remedying any past discrimination to white firefighters. Given this limited role, petitioners could have helped all parties in shaping a better remedy.

Intervention at the remedial stage of complex litigation is often particularly appropriate because it can provide a court with information

necessary for an informed judgment. As Judge Robinson observed in Hodgson v. United Mine Workers of America, 473 F.2d 118, 129 (D.C. Cir. 1972): "Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved." See also Cascade National Gas Corp. v. El Paso Natural Gas Corp., supra; EEOC v. AT&T, supra; System Federation No. 91 v. Reed, 180 F.2d 991 (6th Cir. 1950). The lower courts in this case failed to appreciate the importance of post-judgment intervention when difficult remedial problems are presented. Had intervention been granted in this case, limited to discovery and a hearing describing and supporting alternative promotional plans, the district court could have resolved the merits of the proposals in short order, with little or no delay.

Finally, the course of subsequent events in the present case also tips the scale in favor of intervention. The Sixth Circuit heard this appeal together with an appeal on the merits of the Stotts litigation[4] challenging a recent modification of the 1980 decree. The court affirmed modification of the decree.[5] The minority class representatives sought a preliminary injunction prohibiting the Fire Department from using a "last hired-first fired" formula to lay-off employees in response to an announcement made early in 1981 that the City of Memphis planned to

4. Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982); Stotts v. Memphis Fire Dep't, 679 F.2d 579 (6th Cir. 1982).

5. Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982).

lay-off active personnel because of fiscal problems. The City intended to implement this lay-off policy by measuring seniority on a City-wide basis. Under the plan, those employees whose jobs were in danger of elimination who had sufficient seniority could choose to be demoted rather than laid-off.

On May 4, 1981, the district court temporarily restrained the Department from laying off or demoting blacks occupying certain positions within the Department. On May 5, 1981, the firefighters' Union intervened by consent of the parties, asserting that lay-offs must be made according to city-wide seniority, as provided by the union's memorandum of understanding with the City. After additional hearings, the court issued a preliminary injunction prohibiting use of any lay-off policy that would decrease the percentage of

blacks employed in eleven job categories. The district court's injunction rested in part on the conclusion that the City's seniority system was not bona fide because of its discriminatory effect.

Finally, on June 28, 1982, the district court entered an order enjoining the City from proceeding with thirty-three proposed promotions. The court ordered two blacks to be promoted in lieu of two whites in two job classifications. (Appendix F).

It is clear from these events that the Memphis Fire Department litigation has an ever-widening impact on non-minority employees. The consent decree has been modified - an extraordinary remedy - to reach employment practices that the original settlement did not encompass. No provision was made in either the 1974 or the 1980 decree for lay-off procedures, rank reductions, or

demotions. The union has been allowed to intervene to contest the effect that the modified decree will have on its memorandum of understanding. Petitioners should have the opportunity to present and protect their interests, too, particularly in light of the fact that the decree continues to be modified. Indeed, the need for intervention becomes more acute when a court exercises its supervisory powers to alter a consent decree. See Bolden (Garth, J. concurring in part, dissenting in part) supra; United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972).

By granting the motion to intervene to petitioners, the district court would have acquired the opportunity to consider the adverse impact of its consent decree on non-minority employees and to determine to what extent that impact was "unavoidable". Admittedly, a district

court faces a difficult task in balancing the competing interests of minority advancement and majority expectations. However, just as the Sixth Circuit Court of Appeals has recognized, "reconciliation" of these competing interests, while difficult, is "not impossible". Meadows v. Ford Motor Co., 510 F.2d 939, 949 (6th Cir. 1975) cert. denied, 425 U.S. 998 (1976). At a minimum, all parties whose interests will be affected by a consent decree should be represented at some stage of the proceedings. Abt, Consent Decrees: Can They Withstand The Charge of Reverse Discrimination?, 19 Santa Clara L. Rev. 115, 139 (1979). In remanding the Meadows case to the district court, the Sixth Circuit Court of Appeals directed that "notice should be given to the employees likely to be affected and intervention should be allowed from

appropriate representatives" in attempting to reconcile the interests of minority and non-minority employees. Meadows, 510 F.2d at 949. Petitioners ask for no more and no less in the case at hand.

The time has come for this Court to define the line of demarcation between permissible and impermissible affirmative action plans by recognizing the absolute right of non-minority employees to intervene to represent their interests in the settlement of employment discrimination suits. Only through the recognition of such a right can the Court give meaning to the important requirement that remedies for past race discrimi-nation "not unnecessarily trammel the interests of the white employees".

CONCLUSION

For the reasons stated above, D. L. Orders, et al., respectfully request this court to grant their petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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August 1982.

CERTIFICATE OF SERVICE

A true copy of this pleading or instrument has been properly served by hand upon the following attorneys or solicitors for all interested parties: Richard B. Fields, 525 Commerce Title Building, Memphis, TN, 38103, and Clifford D. Pierce, Jr., Room 125 N. Main, Room 314, Memphis, TN, 38103.

This 4 day of August, 1982.

J. B. Cobb

J. B. Cobb

82-204

No.

Office - Supreme Court,
FILED
AUG 5 1982
ALEXANDER L. STE
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

D. L. ORDERS, W. R. WILKINSON, JACKIE PARMINTER, WARNER C. USELTON, JR., JACK PESGROVE, HAROLD WALLACE, HARVEY JENKINS, FRED E. PERSON, JR., PRESTON LEE DUNN, CHARLEY JONES, JOHN W. BLANTON, FOR THEMSELVES AND ALL OTHER NON-MINORITY EMPLOYEES OF THE MEMPHIS FIRE DEPARTMENT, SIMILARLY SITUATED,

PETITIONERS,

V.

CARL W. STOTTS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, FRED JONES, AND MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS, JOSEPH SABATINI,

RESPONDENTS.

APPENDIX

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TABLE OF CONTENTS

		Appendix Pages
A.	Opinion of the Court of Appeals for the Sixth Circuit, dated May 7, 1982	1
B.	Consent Decree Entered by the District Court, Western District of Tennessee, dated April 25,1980	39
C.	Transcript of the Oral Ruling Made by the District Court, Western District of Tennessee, on Petitioners' Motion to Intervene, dated April 25, 1980	76
D.	Order of the District Court, Western District of Tennessee, Denying Petitioners' Motion to Intervene, dated May 27, 1980	80
E.	Order of the District Court, Western District of Tennessee, Denying Stay Pending Appeal, dated June 9, 1980	87
F.	Order of the District Court, Western District of Tennessee, Modifying 1980 Consent Decree, dated June 28, 1982	89

No. 80-1469

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARL W. STOTTS, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

and

FRED L. JONES,

Plaintiff-Appellee,

v.

MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS, JOSEPH SABATINI,

Defendants-Appellees,

D. L. ORDERS, W. R. WILKINSON, JACKIE PARMINTER, WARNER C. USELTON, JR., JACK PRESCROVE, HAROLD WALLACE, HARVEY JENKINS, FRED E. PERSON, JR., PRESTON LEE DUNN, CHARLEY JONES, JOHN W. BLANTON, for themselves and all other non-minority employees of the Memphis Fire Department, similarly situated,

Proposed Intervenors-Appellants.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed May 7, 1982.

Before: KEITH and MARTIN, Circuit Judges and DUNCAN*.

KEITH, Circuit Judge, deliverd the opinion of the Court, in which DUNCAN joined. MARTIN, Circuit Judge, (pp. 14-38) filed a dissenting opinion.

KEITH, Circuit Judge. On February 16, 1977, Plaintiff Carl Stotts filed a class action alleging that the hiring and promotion policies of the Memphis Fire Department were racially discriminatory. After three of internecine discovery and over four months of intense negotiations, a consent decree settled the action. The decree was preliminarily approved and subsequently posted for comment on April 25, 1980. Neither class members nor the Firefighters Union, the union representative of Memphis firemen, filed objections to the decree. However, two weeks after the court preliminarily approved the decree, eleven non-minority firemen filed a motion to intervene alleging that the decree operated as reverse discrimination against non-minority firemen. After affording the proposed intervenors a hearing, the court rejected the alternative remedial action proffered by the intervenors and ruled that the decree was reasonable. The motion to intervene was denied on the ground that it was untimely. The proposed intervenors appeal. We affirm.

FACTS

On February 16, 1977, Plaintiff Carl Stotts ("Plaintiff") filed a class action against the City of Memphis, the Memphis Fire Department, and the Director of Fire Services for the City of Memphis ("City") alleging that the hiring and promotion policies of the First Department were racially discriminatory. During the 18 months following the filing of the complaint, two articles appeared in the *Memphis Press-Scimitar* which described the Stotts case as an attack on the allegedly racially

* Hon. Robert M. Duncan, United States District Court for the Southern District of Ohio, sitting by designation.

discriminatory hiring and promotion practices of the Memphis Fire Department. One of the articles was a front page story which reported that discovery in the Stotts case revealed that non-minority firemen had been given "cheat sheets" prior to certain Fire Department promotion examinations.

On December 4, 1979, Plaintiff sought and obtained a temporary restraining order ("TRO") enjoining the City from making 19 scheduled promotions in the Fire Prevention Bureau. Plaintiff alleged that minorities would be irreparably harmed if the promotions occurred. The promotions would prevent minorities from acquiring the experience necessary to qualify for supervisory positions. The City opposed the motion, arguing that the promotions were necessary for the efficient operation of the Fire Department. The City rejected the idea of creating "acting" or "temporary" positions and stated adamantly, "We do need to make the promotions." The court granted the motion for the TRO after finding that "there would be irreparable harm if promotions were granted that were not consistent with the rights of plaintiff." On December 5, a front page article in the *Memphis Press-Scimitar* described the effect the TRO would have on the Fire Department.

On January 17, 1980, the City appeared before the court and stated that settlement negotiations were continuing. The parties were not able to agree on the terms of a consent decree for several months. Finally, on April 25, 1980, the parties presented the court with a consent decree ("1980 Decree") which embodied an affirmative action plan. The 1980 Decree contained a minority hiring goal of 50% and a minority promotion goal of 20%. The court preliminarily approved the 1980 Decree and posted it in the fire stations for comment.

Neither the members of the plaintiff class nor the predominantly non-minority Firefighters Local Union 1784 filed an objection to the 1980 Decree. However, on May 12, 1980, eleven non-minority firemen filed a motion to intervene as representatives of all non-minority Fire Department em-

ployees. Allegedly, the posting of the decree in the fire stations was the first occasion the proposed intervenors knew that the Stotts case "may be decided against their interests unnecessarily." The proposed intervenors alleged that the decree's minority promotional goal caused them to be "victims of reverse discrimination." The proposed intervenors also alleged:

> "There were less burdensome alternatives for relief for minority employees while not shifting discrimination to non-minority employees, i.e., creation of additional positions for promotion, organizational restructuring of the Memphis Fire Department, and/or constructive or front-pay or monetary damages to innocent employees who are adversely affected."

On May 16, 1980, the district court conducted a hearing to consider the motion to intervene. At the hearing, the proposed intervenors indicated that the only immediate relief they sought was a delay in the approval of the promotion section of the decree. Allegedly, additional discovery and expert analysis were necessary before concrete alternative remedies for the City's past discrimination could be presented. These alternative remedies would shift the burden of remedying past discrimination from incumbent non-minority employees to the "wrongdoer", the City.

The court also found that the proposed intervenors had adopted a "wait-and-see" posture with respect to the litigation and ruled that the motion to intervene was untimely. The court subsequently rejected the alternatives proffered by the proposed intervenors and ruled that the 1980 Decree was reasonable. The 1980 Decree was intended to parallel and supplement a consent decree entered in 1974 ("1974 Decree"). The 1980 Decree was similar to the 1974 Decree except that it contained specific hiring and promotion goals. The 1974 Decree did, however, contemplate the imposition of hiring and promotion goals if the City's efforts to remedy the effects of its discriminatory employment practices were unsuccessful.

TIMELINESS OF MOTION TO INTERVENE

The eleven proposed intervenors sought permissive as well as intervention of right pursuant to Federal Rules of Civil Procedure 24(a) and (b). Rule 24, in pertinent part, provides:

> (a) INTERVENTION OF RIGHT.
> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) PERMISSIVE INTERVENTION.
> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common.

An application for permissive or intervention of right must be timely. Fed.R.Civ.P. 24(a) and (b). *See NAACP* v. *New York*, 413 U.S. 345, 365 (1973). *Michigan Association for Retarded Citizens* v. *Smith*, 657 F.2d 102, 105 (6th Cir. 1981). If untimely, intervention must be denied. *Id.* Timeliness is a matter within the sound discretion of the district court. *NAACP*, 413 U.S. at 366; *Retarded Citizens*, 657 F.2d at 105. Unless this discretion is abused, the court's ruling will not be disturbed on review. *Id.* Timeliness is to be determined from all the circumstances. *Id.*

In *Retarded Citizens*, Judge Phillips, writing for the court, set forth five factors which are particularly probative in determining whether intervention is timely. The five factors are as follows: 1) the purpose for which intervention is sought; 2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably

should have known of his interest in the case; 3) the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case to apply promptly for intervention; 4) the existence of unusual circumstances militating against or in favor of intervention; and 5) the point to which the suit has progressed. *Retarded Citizens*, 657 F.2d at 105.

1. Purpose For Which Intervention Was Sought

The first factor the district court considered was the purpose for which intervention was sought. The proposed intervenors' motion to intervene was motivated by the belief that the promotion section of the 1980 Decree diminished the promotional expectations of non-minorities and constituted "reverse discrimination." The proposed intervenors sought to delay the implementation of the promotion provisions of the decree until additional discovery and expert analysis could be conducted. The proffered alternatives the proposed intervenors sought to explore were: 1) the creation of additional positions through restructuring the Fire Department; and 2) the payment of compensation to non-minorities whose promotion expectations were diminished by the 1980 Decree. The district court rejected these alternatives as substantively unavailable as a matter of law. We agree.

The district court did not have the authority to restructure the Memphis Fire Department to prevent the 1980 Decree from affecting the promotion expectations of non-minorities. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Moreover, the 1980 Decree is reasonable. Consequently, its operation does not constitute a compensable wrong. *See EEOC* v. *McCall Corp.*, 633 F.2d 1232, 1238 (6th Cir. 1980); *Stotts* v. *Memphis Fire Department*, — F.2d — (6th Cir. 1982); *Setser* v. *Novack Investment Co.*, 657 F.2d 962, 970 (8th Cir. 1981). In fact, the 1980 Decree does not harm or adversely affect any legally protected interest of non-minorities. *Id.*

There is no legally cognizable interest in promotional expectations which presumptively could only occur as the result of discriminatory employment practices. *See Stotts*, — F.2d at —. Consequently, non-minorities are not entitled to compensation. The district court acted correctly in not delaying the implementation of the decree.

2. Knowledge Of Interest In Case

The court also considered the length of time during which the proposed intervenors actually knew or reasonably should have known of their interest in the Stotts action.[1] *See, e.g., Retarded Citizens*, 657 F.2d at 105, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 (1977); *Stallworth* v. *Monsanto*, 558 F.2d 257, 264 (5th Cir. 1977). A party must have been aware of the risk that his interest may be affected by the litigation, *Retarded Citizens*, 657 F.2d at 105, and that his interest may not be fully protected by the existing litigants. *See United Airlines*, 432 U.S. at 394.

The risk that the Stotts action may affect the Fire Department's promotion procedure was inherent from the outset of the litigation. Plaintiff Stotts filed this class action alleging that the Fire Department's promotion policies were racially discriminatory. Obviously, a chief objective of the action was to change the promotion policy. An awareness of the action, therefore, was knowledge that the litigation created a risk that the promotion procedure may be affected.

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[1] The adequacy of representation analysis adopted in the dissent appears to be based on Judge Garth's dissenting view in *Bolden* v. *Pennsylvania State Police*, 578 F.2d 912, 922 (3d Cir. 1978). In *Bolden*, the Third Circuit rejected Judge Garth's view, holding that a government entity acts in the public interest and is presumed to adequately represent the interests of non-minorities when it settles an employment discrimination action with a consent decree. *Id.* at 918.

Today, we hold that the City adequately represented the interests of non-minorities throughout the pre-1980 Decree negotiation process. The City and Plaintiff developed a reasonable consent decree. Therefore, in this case even if the motion to intervene had been filed timely, the proposed intervenors could have done no more than to develop a reasonable consent decree.

Several newspaper articles published in the Memphis area apprised the proposed intervenors of the Stotts action months before the 1980 Decree was announced. Moreover, the proposed intervenors were aware of the Stotts action and its potential ramifications on December 4, 1979, at the latest. On that date, the TRO issued in the Stotts case enjoined certain promotions within the Fire Department. The TRO alone constituted sufficient notice of the Stotts action and its potential impact on promotions. The notice afforded by the TRO was heightened by the provisions of the 1974 Decree. The 1974 Decree contained provisions which sanctioned the imposition of promotional goals. More importantly, the district court's finding that the TRO made the proposed intervenors aware of the Stotts action is unchallenged and not clearly erroneous.

The City, an existing party to the litigation, adequately protected the legally protected interest of non-minorities. At the outset of the litigation, the objective of the City was to refute the allegations of discrimination and maintain the status quo. Maintenance of the status quo was consistent with the objectives and the protection of the legally protected interests of non-minorities.

The objectives of the City and some non-minorities may have diverged when the City agreed to a reasonable consent decree which embodied an affirmative action plan. However, the legally protected interests of the City and non-minorities did not. No legally protected interest of non-minorities is adversely affected by a reasonable affirmative action plan.[2]

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[2] The dissent makes the following assertion: "The majority relies on its earlier conclusion that non-minorities have no interest which could be adversely affected by an affirmative action plan." This is a gross misstatement of the holding in *Stotts* v. *Memphis Fire Fighters*, —— F.2d —— (6th Cir. 1982). In *Stotts*, we simply followed an earlier decision of the court which held that a reasonable affirmative action plan does not adversely affect any legally protected interest of non-minorities. *See McCall*, 633 F.2d. at 1238. A reasonable consent decree is a term of art which indicates that the decree has been judicially sanctioned as a reasonable means to correct the effects of past discrimination. *Id.*

See Stotts v. *Memphis Fire Department*, — F.2d — (6th Cir. 1982); *McCall Corp.*, 633 F.2d at 1238; *Setser*, 657 F.2d at 970. Non-minorities do not have a legally protected interest in promotions which could only occur as the result of presumptively discriminatory employment practices. *See Stotts*, — F.2d at —. The City has a responsibility to vindicate a societal interest inherent in Title VII in developing race-conscious affirmative action to eliminate the effects of past discrimination. *Id.*; *Detroit Police Officers Assoc.* v. *Young*, 608 F.2d 671, 690 (6th Cir. 1979). The City acts in the interest of both minorities and non-minorities, in agreeing to a reasonable consent decree. *Detroit Police Officers Assoc.*, 608 F.2d at 695-96; *Talbert* v. *Richmond*, 648 F.2d 925, 931 (4th Cir. 1981). A reasonable consent decree frees minorities from discrimination while simultaneously preventing non-minorities from being victims of reverse discrimnation. In fact, cities, particularly those with significant minority populations, increase the effectiveness of their city services when they implement race-conscious affirmative action designed to attain racial diversity in all levels of municipal government. *See Detroit Police Officers Assoc.*, 608 F.2d at 696; *Talbert*, 648 F.2d at 931.

In the instant case, the court afforded the proposed intervenors an opportunity to air their objections to the 1980 Decree. This is all that the court was required to do given its determination that the 1980 Decree was reasonable. *See Metropolitan Housing Development* v. *Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980); *EEOC* v. *American Telephone and Telegraph Co.*, 556 F.2d 167, 173 (3d Cir. 1977). The city adequately represented the interest of non-minorities when it agreed to a consent decree which the court determined was reasonable.[3]

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[3] Even assuming the objectives of the parties and not their legally protected interest is the relevant inquiry, the intervenors' motion would still be untimely. The risk that the City would not ade-

3. Prejudice To Original Parties

The prejudice to the original parties due to the failure to intervene after the proposed intervenors knew or reasonably should have known of their interest in the case is the third factor the court considered. *See Retarded Citizens*, 657 F.2d at 105; *Culbreath* v. *Dukakis*, 630 F.2d 15, 21 (1st Cir. 1980). The court considered the effect any delay in the relief afforded by the 1980 Decree would have on the plaintiff class members. The court found that a "good bit of value" would be lost if the implementation of the decree was delayed. Minorities had been virtually excluded from the Memphis Fire Department for decades. The Stotts action was filed in 1977 to correct the effects of the City's past hiring and promotion discrimination. The relief afforded by the decree had been delayed during the three years of discovery and months of negotiations. The prospect of delaying the 1980 Decree while the proposed intervenors engaged in additional discovery and expert analysis prompted the court to state: "It would be unfair and inequitable to postpone any longer the long overdue relief accorded to the plaintiffs and class members herein by the Consent Decree." The prejudice which would have resulted from granting the motion to intervene would have been particularly intolerable in the instant case. The alternative relief the proposed intervenors were attempting to pursue simply was not legally available. The district court acted correctly in considering the detriment minorities would suffer

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quately protect the objectives of some non-minorities was evident from the inception of the litigation. The 1974 Decree indicates a willingness to agree to promotional goals. This foreshadowing indicates that any reliance non-minorities placed in the City to not agree to changes in the promotion procedure within the Fire Department was misplaced. Non-minorities should have attempted to intervene when they first became aware of the action, rather than adopting a "wait-and-see" approach toward the Stotts action. Even had the proposed intervenors attempted to intervene at an earlier date, their consent was not required before the consent decree could be entered. A reasonable consent decree does not adversely affect any legally protected interest of non-minorities. *See* McCall, 633 F.2d at 1238; *Stotts*, —— F.2d ——.

if intervention was allowed. *See Retarded Citizens*, 657 F.2d at 105.

The court also considered the prejudice the City would suffer if the consent decree was not implemented immediately. The City asserted that the TRO previously issued by the court delayed "necessary promotions within the Fire Department." Permitting intervention would have delayed the necessary promotions even longer. The Fire Department's ability to function would have been jeopardized by the delay sought by the proposed intervenors. Manifestly, the public interest in efficient, effective firefighting services required that the court act consistent with the rights of parties to eliminate the disability caused by the TRO at the first opportunity. The district court acted correctly in considering the effect the intervention would have on the functioning of the Fire Department. *See Harper* v. *Kloster*, 486 F.2d 1134, 1137 (4th Cir. 1973).

4. Unusual Circumstances

The court has continuing jurisdiction to modify the 1980 Decree should its operation become unreasonable. *See United States* v. *Chicago*, 663 F.2d 1354 (7th Cir. 1981) (en banc); *United States* v. *City of Miami*, 614 F.2d 1322, 1333-34 (5th Cir. 1980), *on reh.*, 664 F.2d 435 (5th Cir. 1981). This is an important, unusual circumstance militating against allowing intervention.[4] An additional factor which weighed against allowing intervention was the months of settlement negotiations and the three years the case had been pending. The court's consideration of these circumstances was not error.

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[4] The following statement made in the Dissent is imprecise. "Appellants [the proposed intervenors] cannot vindicate their interest in a separate proceeding because the consent decree is immune from collateral attack." A reasonable consent decree cannot be attacked in a collateral proceeding. However, the court has continuing jurisdiction to modify the decree should its operation become unreasonable in the future. Thus, the proposed intervenors are not absolutely barred from objecting to the 1980 Decree.

See Retarded Citizens, 657 F.2d at 105; *NAACP*, 413 U.S. at 366.

Timeliness is a matter within the sound discretion of the district court. *See Retarded Citizens*, 657 F.2d at 105; *NAACP*, 413 U.S. at 366. Unless this discretion has been abused, the district court's ruling will not be disturbed on appeal. *Id.* The district court did not abuse its discretion in ruling that the motion to intervene filed by eleven non-minority firemen was untimely. Judge McRae's careful and delicate consideration of the factors for determining timeliness was commendable. Accordingly, we affirm the judgment of the district court.[8]

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[8] The Dissent grossly misstates the facts and holding in *Baker* v. *City of Detroit*, 504 F.Supp. 841 (E.D. Mich. 1980). The Dissent notes: "Although timeliness was not at issue in *Baker*, I note that intervention was granted three years after the suit was filed, virtually on the eve of trial." This assertion is patently false and misleading. In *Baker*, the complaints were filed in November of 1975. Minority police officers filed a motion to intervene in May of 1978. Trial did not begin until nearly three months later in August of 1978. The motion to intervene was not, as the Dissent implicitly suggests, made on the eve of trial. The dissent also states: "Judge Keith commented: [W]ith the wisdom of hindsight . . . [p]erhaps the intervenors should have moved to intervene earlier. However, the plaintiffs suffered no prejudice from this. 504 F.Supp. at 849." The quote from page 849 of the *Baker* opinion not only distorts the expressed meaning of the paragraph, but is itself an inaccurate statement of the language of the opinion. The full paragraph from which the quoted language is taken states as follows:

> As it turned out, the City defendants, at trial, did present extensive evidence of past discrimination. With hindsight it could be argued that the presence of counsel for intervenors was unnecessary. At the same time, counsl for intervenors did an excellent job at trial. Counsel did not interfere with the presentation of either side's case. Counsel protected intervenor's interests, and presented useful additional evidence at trial on the issue of past discrimination. Perhaps the intervenors should have moved to intervene earlier. However, the plaintiffs suffered no prejudice from this.

A fair reading of the paragraph indicates that a motion to intervene filed three months prior to trial is tardy, but not necessarily untimely. *Baker* cannot reasonably be construed to support the Dissent's position that a motion to intervene filed two weeks after a consent decree has been preliminarily approved is timely.

Finally, the dissent quotes as follows: "Had black officers or the U.S. Government filed a suit alleging illegal discrimination on the part of the City of Detroit and seeking affirmative relief, it is likely

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that such a suit would have [been] settled and a consent decree entered. That consent degree would then have been subject to judicial review, after due opportunity for intervention and/or objection by white officers." This statement was reaffirmed in *Stotts* v. *Memphis Fire Fighters*, —— F.2d ——. In *Stotts*, we held expressly that "a hearing should be held to enable all individuals who may be affected by the decree to air objections to it." *Id.* at ——. The proposed intervenors filed a motion to intervene and object to the 1980 Decree. The trial court afforded them a hearing. During the hearing, the basis for the motion to intervene as well as alternatives to the 1980 Decree were discussed. There is evidence in the record that the alternatives suggested by the proposed intervenors were considered and rejected.

The Dissent also makes much of the fact that the proposed intervenors made hearsay statements that the City agreed to the 1980 Decree at least in part because of the anticipated expenses of trial. One of the advantages of consent decrees is that the expense of trial is avoided. Moreover, the 1974 and 1980 Decrees both state that the desire to avoid the expense of trial was one of the factors which promoted settlement.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting. I dissent for the following reasons. In my view, Judge McRae applied an incorrect standard to measure the timeliness of the intervention motion. Because I feel strongly that appellants are entitled to their day in court as intervenors, I write separately, setting forth my reading of the record and my analysis of the timeliness inquiry.

The sole issue presented by the proposed intervenors' appeal concerns the timeliness of a motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). Appellants are a group of eleven white employees of the Memphis Fire Department, informally called "Firefighters for a More Appropriate Remedy." They petitioned for leave to intervene in a class action brought by black firefighters alleging racial discrimination in the Fire Department's hiring and promoting practices. Soon after appellants learned that the Department had agreed to settle the case by consent decree, they sought intervention for the limited purpose of shaping a less burdensome remedy for future promotions within the Memphis Fire Department.

Both the class representatives and the Department opposed intervention. Appellants now challenge denial of their motion, which they filed before the District Court finally approved the consent decree. On May 16, 1980, the District Court denied appellants' motion as untimely. Today the majority affirms this ruling. I would reverse for the following reasons.

I. HISTORY OF THE LITIGATION

Because the timeliness of the motion is the central issue on appeal, I will describe briefly the history of the Memphis Fire Department litigation. I state the facts separately because I interpret the record differently than does the majority. On November 27, 1974, the United States Department of Justice and the City of Memphis entered a consent decree

which terminated a suit brought by the Attorney General to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* In the 1974 decree, the City denied the government's charges of past sex and race discrimination, but agreed to establish goals for hiring more blacks and women, in numbers "approximating [their] respective proportions in the civilian labor force." As an interim goal, the City also promised to attempt to fill at least fifty percent of all City vacancies with qualified black applicants. The decree applied to various City agencies, including the Fire Department.

On February 16, 1977, Carl Stotts, a black Fire Fighting Captain, sued the Fire Department, alleging that he and other similarly situated blacks had been denied promotions because of their race. After discovery had been taken, the District Court certified the Stotts suit as a class action. On June 19, 1979, Fred Jones, a black Fire Fighting Private, brought an individual action against the Fire Department, alleging that the Department had not promoted him to Fire Inspector because he is black.

Three months after Jones filed his complaint, the District Court consolidated the Fire Department cases for trial. Shortly thereafter, the Fire Department moved for summary judgment and class decertification. On December 12, 1979, the District Court denied both motions. One week earlier, the plaintiffs had requested and received an order temporarily restraining all imminent promotions of blacks and whites in the Department's Fire Prevention Bureau, to prevent "irreparable injury" to black employees. Nineteen promotions in the Bureau were postponed until February 7, 1980, a tentative trial date.

The litigants informed the District Court on February 25, 1980 that they were negotiating the terms of a consent decree to settle their dispute. Two months later, the court held a hearing and conditionally approved a proposed agreement submitted by the Department and the black firefighters. The

District Court ordered the parties to post a copy of the proposed settlement in each City fire house until May 12, 1980 to allow class members fifteen days in which to review its contents and to file any objections with the court. At this hearing the court asked counsel for the Department whether he expected anyone to object to the decree. Counsel replied that the firefighters' union might object.

No objections were filed by class members or the union within the fifteen-day period. However, on May 12, 1980, appellants filed their motion to intervene in their own right and as representatives of non-minority employees. Appellants feared that the proposed decree threatened their interests because the Department had agreed to institute an affirmative promotional system whereby twenty percent of all future promotions would be filled by minority employees.

On May 16, 1980, the District Court held a hearing at which appellants stated their case for intervention. They emphasized that they did not object to entry of the decree, nor did they seek to delay implementation of those provisions that advanced the rights of black employees. Appellants challenged the decree only to the extent that it might hamper or foreclose future promotions of white employees. To protect their "important interest" in the matter, appellants requested intervention as an opportunity to present and explore alternative remedies that would place the burden of compliance on the wrongdoer – the Fire Department – rather than on innocent employees. One possible remedy advanced by appellants to distribute the burden more equitably was front pay and constructive promotion for white firefighters. Appellants also suggested monetary relief or Department reorganizations as alternatives which might prove less burdensome. The only immediate relief appellants requested was postponement of the twenty percent future promotional provision, until its adverse impact on white firefighters could be examined.

Appellants also argued that their motion was timely, because they filed it a mere two weeks after they first learned

that the Department had negotiated a settlement that would impair their interests and those of all white firefighters. According to appellant, they had no indication that the Department was no longer "hotly contesting" the litigation until they saw the notices posted in the fire houses. All eleven applicants stated that they were never notified formally about either the underlying litigation or the settlement negotiations. As proof that the Department inadequately represented their interests in both settling the case and in the substantive provisions of the consent decree, appellants offered several affidavits in which the affiants stated that the City Attorney admitted to them that the Department settled the case to avoid the expense of a trial.

At the hearing, both the Department and the plaintiffs voiced their opposition to the proposed intervention. The District Court denied the motion, making the following observations:

> *[O]ne of the factors* is *whether it is going to delay the relief that will be achieved by trial* or settlement or whatever it is, and this case has had a good bit of impact on the Fire Department. I have issued some injunctive relief that the City has — that has caused the City to appear in court and assert to the court that necessary promotions in the Fire Department were being held up because of this litigation. . . . and also *I think that there is a good bit of value to be obtained, certainly as far as the minority people, of going ahead and getting this thing over* with.
>
> Now I don't care when we do it. Somebody is going to be unhappy. *And I would not be a party to any of this constructive promotion bit. That's not much good for anybody. And it is certainly not good — well, that's no way to run a fire department,* and to create more top jobs is no solution. I think this relief is only a goal to be attempted, and it's not any ironclad requirement, and I think it is long overdue. *I don't believe it would be*

> ***right to let someone come in at the last minute and interfere with the implementation of this.*** I might also observe that I think the provisions of the consent decree are reasonable, and therefore, on the merits I see no great need to let somebody intervene.

The District Court supplemented its reasons for denying intervention in a subsequent memorandum. The court at all times treated the motion as one for intervention as of right under Rule 24(a)(2), and found that it was untimely because the suits had been pending for almost three years. In addition, the court reasoned that because "all promotions have been stayed since 12/5/79",[1] appellants have been "*on notice of the pendency of [the] actions* at least since that time." The court rejected the argument that timeliness should be measured from the date the appellants first learned that the settlement would harm their interests. It found that "the intervenors adopted a 'wait-and-see' posture with respect to this litigation and [they] have waited too long to come forward."

Based on the record and the oral ruling of the District Court, which the majority fails to quote, I cannot agree that the court "afforded the proposed intervenors a *full opportunity* to air their objections to the 1980 decree." Majority op. at — (emphasis added). Nor can I agree that the court below fully considered the alternatives proposed and rejected them as "substantively unavailable as a matter of law," as the majority asserts. The District Judge simply concluded that "that's no way to run a fire department." Finally, I cannot agree with the majority's analysis of the timeliness inquiry, which

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[1] This statement is incorrect. Only nineteen promotions to upper-level management positions in the Fire Prevention Bureau were frozen by the temporary restraining order. The Fire Department consists of nine bureaus, ranging from Communications to Ambulance Services. All eleven applicants belong to the Fire Fighting Bureau. The temporary freeze on promotions applied to the Fire Prevention Bureau only, a comparatively small segment of the Department.

supports its conclusion that the District Court ruled correctly on the motion.

II. INTERVENTION AS OF RIGHT IN GENERAL

A motion for intervention must be timely, whether it is brought under section (a) or section (b) of Rule 24. Under Rule 24(a)(2), an applicant *shall* be permitted to intervene in an action:

> [1] when [he] claims an interest relating to the property or transaction which is the subject of the action and [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [3] unless [his] interest is adequately represented by existing parties.

A. Interest and Impairment

Before I discuss the timeliness of the appellants' motion, I must first discuss the Rule's other requirements. As an initial matter, it is clear that white firefighters have an *interest* relating to the subject matter of the action. The majority incorrectly asserts that the decree does not "adversely affect any legally protected interests of non-minorities," to justify its conclusion that appellants have not shown an "interest" in the subject matter of the suit. Although it is true that appellants do not have a *vested right* to rank order selection in a particular manner or sequence, unless perhaps such an order is secured by a collective bargaining agreement or other contract, appellants do have an *interest* in protecting and advancing their promotional opportunities within the Department. This is all that the Rule requires — a showing of "an interest relating to the property or transaction" involved in the suit. The Supreme Court has stated unequivocally that non-minorities enjoy legitimate "expectations" of promotions and seniority, which must be balanced against those interests of discriminatees in Title VII cases. *Int'l Brotherhood of*

Teamsters v. *United States*, 431 U.S. 324, 375-376 (1977). Recently the Seventh Circuit recognized the validity of non-minority interests in promotional expectations when it modified an injunction to reduce minority promotional quotas from forty percent to twenty-five percent. The court ordered the reduction because the higher quota was unfair to non-minorities on the eligibility roster who were passed over as a result of the forty percent quota: "Because we have concluded that continuance of the forty percent promotional goal is not justified . . . *failure to grant modification would unnecessarily and therefore unjustly defeat the opportunities for promotion of these innocent persons.*" *United States* v. *City of Chicago*, 663 F.2d 1354, 1361 (7th Cir. 1981) (emphasis added). I can only conclude from these authorities that an interest sufficient to compel modification of a permanent injunction is a sufficient "interest" for purposes of Rule 24(a)(2).[2]

The consent decree, with its twenty percent minority promotional quota, affects the white firefighters' interest in career advancement by reducing the likelihood that they will be promoted on schedule. This interest is quite obviously antagonistic to that of the Fire Department. In my view, appellants' interests are also adverse to those of the minority firefighters. I disagree with the majority's assertion that minority and non-minority employees' interests are compatible in the context of an employment discrimination suit. It is a fact that non-minorities typically have been required "to bear the burden" of remedial measures taken to correct the effects

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[2] I note that 42 U.S.C. § 2000e-2(a)(2) suggests that promotional opportunities are interests worthy of court recognition and protection. That section proscribes the classification of employees "in any way which would deprive or tend to deprive any individual of *employment opportunities* or otherwise adversely affect his status as an employee," based on race, color, or sex, among other criteria. A promotion is an "employment opportunity" within the meaning of this section.

Whatever the precise legal status may be of non-minorities' promotional expectations, they are clearly "interests" adequate for intervention status, and should not be lightly dismissed.

of past discrimination by employers. *Detroit Police Officers' Association* v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, — U.S. —, 69 L.Ed.2d 951 (1981). An affirmative action promotional goal contains the seeds for anger and discord in the workforce. As two authors have noted, remedies which displace whites "exacerbate minority-majority tensions which are already explosive. . . . Put differently, displacement of whites lends credence to the idea that majority-minority interests are inherently opposed. . . ." Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach*, 13 HARV. CIV. R.-CIV. LIB. L. REV. 81, 94 (1978). This observation is lamentable but valid.

Appellants satisfy the impairment requirement as well. It is clear that the decree may, as a practical matter, impair appellants' interest because the Department is bound to follow the decree's promotional goals. Appellants cannot vindicate their interest in a separate proceeding because the consent decree is immune from collateral attack. *See generally Cascade Natural Gas Co.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Stallworth* v. *Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977); 7A Wright & Miller, *Fed. Prac. & Proc.* § 1908 (West 1972). I conculde that appellants satisfy Rule 24(a)(2)'s first two requirements.

B. Adequacy of Representation

Some doubt exists whether an applicant or an opponent bears the burden of proving or disproving inadequate or adequate representation.[3] Nevertheless, the applicant's burden of showing inadequate representation is "minimal." *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). An applicant for intervention as of right satisfies the requirement

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[3] Compare *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967) (burden on opponents to show adequate representation) *with Edmondson* v. *Nebraska ex rel. Meyer*, 383 F.2d 123 (8th Cir. 1967) (inadequacy is a necessary element movant must show.)

by demonstrating that representation of his interest *may* be inadequate. *Id.*; *Corby Recreation, Inc.* v. *General Electric Co.*, 581 F.2d 175 (8th Cir. 1978) (per curiam); *Natural Resource Defense Council, Inc.* v. *United States Nuclear Reg. Comm.*, 578 F.2d 1341 (10th Cir. 1978).

I reject the majority's conclusion that the Fire Department adequately represented the white firefighters in the settlement negotiations and the consent decree. The majority reasons that the Department acted in the "public interest" by adopting a "reasonable consent decree", therefore all interests, including those of non-minorities, were adequately represented. The majority relies on its earlier conclusion that non-minorities have no interest which could be adversely affected by an affirmative action plan. In my view, the majority misses the point of *Trbovich's* inadequacy analysis. Although the logic of the majority's articulated reasons is hard to follow, perhaps it can be interpreted as a form of an argument advanced by appellees in this case. Appellees suggest that a state or governmental entity is presumed to represent its citizens adequately in public litigation. *See Commonwealth of Pa.* v. *Rizzo*, 530 F.2d 501 (3rd Cir.), *cert. denied*, 426 U.S. 921 (1976). I agree that under normal circumstances a state body is entitled to a presumption of adequacy. However, when the state acts in a proprietary role, different considerations apply. In my view, when the state is sued in its private capacity as an employer, it makes little sense to presume that it adequately represents the interests of its adversaries, namely its employees. Although the Department was sued originally by *black* employees, in the context of an employment discrimination suit when an employer may be forced to make large concessions to one group at the expense of another, *all* employees are potential adversaries.

In this situation, the Department's interests were not clearly adverse to those of the white firefighters until the Department negotiated and signed the consent decree. At this juncture,

the presumption of adequacy vanished. In the decree, the Department consented to a twenty percent minority promotional goal which would not affect the operation of the Department, but which *would* affect promotional opportunities for whites. This provision of the decree gives appellants a distinct divergent interest from that of the Department. A *fortiori*, the Department cannot protect it adequately. This is sufficient to satisfy *Trbovich's* minimal showing of inadequate representation. *See also United Air Lines* v. *McDonald*, 432 U.S. 385 (1977); *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Smuck* v. *Hobson*, 408 F.2d 175 (D.C.Cir. 1969).

C. Timeliness

I turn to discuss Rule 24's threshold requirement of timeliness. The concept of Rule 24 timeliness is vague. Neither the Rule itself nor the courts have defined or clarified it with precision or consistency. Because of, or rather despite its vagueness, the question of timeliness has been left to the sound discretion of the district courts. The scope of appellate review is therefore limited to the question whether the District Court abused its discretion or erred as a matter of law in denying appellants' motion. *Michigan Ass'n. for Retarded Citizens* v. *Smith*, 657 F.2d 102 (6th Cir. 1981).

The broad discretion that the Rule vests in the district courts has been criticized because it virtually shields a district court's timeliness decision from effective appellate review. *E.g.* Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. CIV.RIGHTS - CIV.LIB.L.REV. 31 (1979); Note, *The Timeliness Threat to Intervention of Right*, 89 YALE L.J. 586 (1980). However, an appellate court's ability to review a district court's timeliness determination should not be as limited as these critics fear. This court has stated that timeliness must be "determined from all the circumstances", *Michigan Ass'n.*

for Retarded Citizens v. *Smith*, 657 F.2d at 105 *quoting* *NAACP* v. *New York*, 413 U.S. 345, 365 (1973), rather than from purely chronological circumstances. A court is not free to design its own calculus of circumstance. Rather, four critical factors must govern the timeliness inquiry,[4] in my view.

(1). Initially a court must consider the length of time that an applicant either knew or reasonably should have known of his interest in the case, before he sought to intervene. *United Air Lines* v. *McDonald*, *supra*; *Michigan Ass'n. for Retarded Citizens* v. *Smith*, *supra*; *Stallworth* v. *Monsanto Co.*, *supra*. For purposes of this inquiry, the time the proceedings were initiated is largely irrelevant, as is the time an applicant first learns of the proceedings. Although *NAACP* v. *New York* contains language suggesting that promptness can be measured from the time a proposed intervenor learns that litigation is pending,[5] I reject this reading of the Rule. As the Fifth Circuit points out in *Stallworth*, the Supreme Court in *United Air Lines*, a more recent opinion, measured promptness from the time the applicant first learned that her interests "would no longer be protected by the named class representatives," rather than from the time she first learned of the lawsuit. *Stallworth* v. *Monsanto Co.*, 558 F.2d at 264. In my view, knowledge that litigation is pending is pertinent to Rule 24 timeliness only when its acquisition coincides with an appli-

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[4] I would reject the timeliness test used by the Eighth Circuit in *Nevilles* v. *EEOC*, 511 F.2d 303 (1975) (per curiam). I agree with the First Circuit that the *Stallworth* test with its four factors, is appropriate. *Culbreath* v. *Dukakis*, 630 F.2d 15 (1980).

[5] *See* 413 U.S. at 366. Although *NAACP* could be read to suggest a different triggering date, that opinion has been described as "sui generis", explicable largely because of the urgency of expediting the case due to an impending primary election, and because of the NAACP's ability to renew its motion at a later time, given the court's continuing jurisdiction over the matter. Jones, *supra* at 82. Justice Brennan's dissent in *NAACP* also suggests the limited scope of that decision: "The case plainly turns on its facts, and *its impact on the development of principles governing intervention will doubtless be small.*" 413 U.S. at 373 (emphasis added).

cant's realization that his interests are threatened and unprotected by existing parties.

This Circuit's decision in *Retarded Citizens*, however, suggests that the length of time a suit has been pending is a relevant consideration. I rely on that decision in my analysis only to the extent that *Retarded Citizens* is consistent with *United Air Lines*, the Supreme Court's most recent and expansive treatment of Rule 24 timeliness. *Retarded Citizens* neither cites nor discusses *United Air Lines*, which departs from *NAACP* v. *New York*. I therefore question *Retarded Citizens* in an attempt to bring this Circuit within the ambit of the Supreme Court's pronouncements. *Retarded Citizens* relies exclusively on *NAACP* v. *New York* as authority for the statement that "although the point to which a suit has progressed *is one factor* in the determination of timeliness, it is not solely dispositive." 657 F.2d at 105. The validity of this statement is doubtful, given the Supreme Court's clear directive in *United Air Lines* that time starts to run against an intervenor only from the moment he knows that his interest in a case has not been or is no longer being protected by existing parties. Assuming arguendo that a court may properly consider the length of time a suit has been pending, *Retarded Citizens* states plainly that "this is not dispositive." 657 F.2d at 105.

(2). A court must also consider whether the existing parties will suffer prejudice from an applicant's "*failure to apply for intervention as soon as he actually knew* or reasonably should have known of his interest in the case." *Id.* (emphasis added); *Culbreath* v. *Dukakis*, 630 F.2d at 21; *Stallworth* v. *Monsanto Co.*, 558 F.2d at 65. The prejudice inquiry is narrow: only that prejudice attributable to a movant's failure to act promptly may be considered. The broader factor of prejudice that may flow from the intervention itself does not weigh in the balance. A broad examination of prejudice is appropriate only when a court considers a motion for permissive intervention under Rule 24(b), which expressly di-

rects the court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See* Note, *The Timeliness Threat to Intervention, supra.* Rule 24(a)(2) does not contain similar language, and should not be interpreted in a similar way.

(3). The third factor a court must consider is whether the applicant will be harmed if he is not allowed to intervene. *Stallworth* v. *Monsanto Co., supra.* This component is self-explanatory, but I note that principles of basic fairness should guide a court in determining whether an applicant should have an opportunity to be heard.

(4). Fourth, a court must evaluate any unusual circumstances militating either for or against intervention. *Michigan Ass'n. for Retarded Citizens* v. *Smith, supra.* Finally, in *Retarded Citizens*, Judge Phillips stated that a court should also consider the purpose for which intervention is sought. This purpose may, in a given case, tip the balance in favor of timeliness.

III. THE DISTRICT COURT'S AND THE MAJORITY'S TIMELINESS ANALYSIS

With the foregoing principles in mind, I must conclude that the District Court erred in denying the motion as untimely. First, the court measured promptness by an incorrect legal standard. The court considered the motion's timeliness by reference to "the length of time these cases have pending." It concluded that appellants *had been on notice of the litigation* since December 5, 1979, the date certain promotions in the Fire Prevention Bureau were frozen. The court thus incorrectly held that time began to run against the applicants from the moment that they first learned or reasonably should have learned about the class action. Even assuming that a court may properly consider the length of time a case has been pending, Judge McRae abused his discretion in my view by exalting this favor over all other relevant considerations.

In affirming the District Court's order, the majority implicitly holds that time starts to run against an applicant when he first learns of the proceedings. The Fifth Circuit rejected the very rule the majority approves in this case, for fear that it:

> would encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is correspondingly high . . . Such a rule would also mean that many individuals who excusably failed to appreciate the significance of a suit at the time it was filed would be barred from intervening to protect their interests when its importance became apparent to them later on.

Stallworth v. *Monsanto Co.*, 558 F.2d at 265. *See also United Air Lines* v. *McDonald*, 432 U.S. at 394, n.15. In my view, such a rule is both unsound and unfair. The majority completely ignores the reasons Judge McRae explicitly gave for denying the motion: "The motion to intervene is not timely because of the length of time these cases have been pending. . . . This court is of the opinion that the proposed intervenors have been on notice of the pendency of these actions (since the time) all promotions have been stayed." Judge McRae rejected appellants' assertions that *the consent decree itself*: (1) notified them for the first time that their interests were threatened; and (2) triggered their right to intervene. He simply measured timeliness from the moment the appellants learned that the lawsuit was pending. I believe this to be error.

In an attempt to avoid acknowledging the District Court's error, the majority speculates that appellants must have known that the litigation would ultimately affect the Department's promotional policies, when appellants first became aware of

the lawsuit from the Memphis media. At the very latest, the majority speculates, appellants should have recognized the risk when the court temporarily restrained a small number of promotions in one bureau of the Department. I would reject this hypothesis for several reasons. First, it is so conjectural that it is meaningless. Any applicant who moved to intervene in a proceeding asserting a *possibility* that his interests *might be* affected by some aspect of a future judgment would face an uphill battle indeed to satisfy Rule 24(a)(2)'s interest, inadequacy, and impairment requirements. The Rule requires a showing beyond a merely speculative interest. *See, e.g., Penick* v. *Columbus Educ. Ass'n.*, 574 F.2d 889 (6th Cir. 1978). The majority's interpretation of the Rule requires an applicant to move for intervention at a time when it would be impracticable and impossible to predict the ramifications of a lawsuit upon the applicant.

Second, the majority ignores the fact that appellants are concerned only with the fairness and operation of the twenty percent goal, which first surfaced publicly when the consent decree was published on April 25, 1980. I fail to see how a temporary order restraining a few promotions in one bureau of a large Fire Department — not one of which affected any of the appellants personally — could have apprised appellants of the likelihood that the Department would adopt a Department-wide affirmative action promotional plan. I admire the prescience of anyone who could have predicted that the Department would eventually volunteer affirmative action relief. Such a prediction would have been impossible in this case because the agreement was born of four months of intense, unpublicized negotiations. Furthermore, the Department objected vigorously to the restraining order, arguing that the promotions were necessary for efficient operation. In fact, the Department bitterly contested the litigation at every step until it announced that it would settle the case. The Department also rejected the suggestion that it create temporary positions. Given these facts, I cannot agree that appellants

should have guessed that the Department would: (1) settle the case at all; and (2) voluntarily agree to institute Department-wide affirmative promotional goals.

Furthermore, I find no support in the record for the District Court's comment that appellants "adopted a wait-and-see posture." The majority views this comment as dispositive of the appeal. The only evidence on this issue convinces me that appellants did not learn about the consent decree and the adverse impact of its promotional goals until copies were posted in each firehouse. The affiants who supported the motion all stated that they were not notified that the parties had negotiated a settlement until April 25, 1980, when the consent decree first surfaced publicly. Neither the record parties nor the court took any steps before this date to inform appellants that the litigation would soon terminate by mutual consent. The majority can point to nothing in the record to show that appellants knew about the decree itself, let alone its potential impact on them, before April 25. In my view, appellants acted promptly by filing their motion two weeks after they first saw the decree on the firehouse wall.

The majority fails to recognize that an agreement to settle bitterly contested litigation by consent decree is in itself an event that will trigger the need and the right to intervene. Generally it has been held that intervention is timely and permissible even after parties have agreed to settle litigation by decree. In *Piambino* v. *Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980), the Fifth Circuit held that a non-party's right to intervene was triggered by the publication of an adverse settlement agreement. In *Baker* v. *City of Detroit*, 504 F.Supp. 841 (E.D. Mich. 1980), Judge Keith, sitting by designation, awarded attorneys' fees to a group of black police officers who had intervened in a reverse discrimination suit to protect their interests. Although timeliness was not at issue in *Baker*, I note that intervention was granted three years after the suit was filed, virtually on the eve of trial. Judge Keith commented: "[W]ith the wisdom

of hindsight . . . [p]erhaps the intervenors should have moved to intervene earlier. However, the plaintiffs suffered no prejudice from this." 504 F.Supp. at 849. In deciding to award attorneys' fees to intervenors' counsel, Judge Keith discussed at length the circumstances precipitating intervention, commenting:

> Had black officers or the United States Government filed a suit alleging illegal discrimination on the part of the City of Detroit and seeking *affirmative relief*, it is likely that such a suit would have settled and a consent decree entered. That consent decree *would then have been subject to judicial review, after due opportunity for intervention and/or objection by white officers.*

Id. at 847 (emphasis added). "Then" is a temporal word meaning "thereafter" or "subsequently." Judge Keith's use of this language is clear recognition that post-consent decree intervention by white employees is appropriate in general, and in the case before us. Nevertheless, Judge Keith now sanctions a rule which, in effect, rejects intervention as a legitimate means by which to challenge a consent decree. The majority's analysis places an unfair and unjustifiable burden on a potential intervenor to predict the likely outcome of a complex case, well before the issues have crystallized. Furthermore, its analysis denies to unrepresented persons the right to challenge broad remedies which may impinge upon their interests.

I cannot accept the majority's assertion that several newspaper articles should have apprised appellants that this litigation would compromise their interest in future promotions. Just a glance at these articles convinces me that they cannot serve as adequate notice. Not one mentions the nature and scope of the broad affirmative relief that the Department ultimately adopted in the Decree. The March 11, 1978 article merely described the complaint, stating that plaintiffs sought back pay; the headline on the September 11, 1978 article, "Fire Department Suit Seeks Back Pay", did not men-

tion affirmative relief in the nature of promotional goals; and the December 5, 1979 article, "Promotions at Fire Bureau Blocked by Court's Ruling", neither discussed nor intimated in any way that the Department would adopt promotional goals in a consent decree. In short, not one of the articles predicted that the case would be settled. Nor did they describe the relief that such a settlement would provide. In my view, the articles could not have informed eleven unsophisticated firefighters about the possibility of affirmative promotional goals.

I turn to discuss the District Court's second error in ruling on appellants' motion. Judge McRae erroneously considered the prejudice existing parties would suffer if intervention were allowed. In its order, the court stated that "it would be unfair and inequitable to postpone any longer the long overdue relief accorded to the plaintiffs and class members herein by the consent decree." The court's concern, although admirable, improperly injects a foreign element into the Rule 24(a)(2) calculus. The law in this Circuit, announced by Judges Keith and Phillips in *Retarded Citizens* is crystalline: a judge may consider only that prejudice the original parties would suffer from a proposed intervenor's failure to move promptly after he knew or reasonably should have known that his interests were threatened. The prejudice inquiry is narrow, limited to such considerations as the diasppearance of evidence and the unavailability of witnesses. *United Air Lines* v. *McDonald*, 432 U.S. at 393 n.14. This element of the timeliness inquiry does *not* permit broad assessments of the fairness to existing parties of the substance of an intervenor's challenge.

The majority, however, approves Judge McRae's conclusion that it would be unfair to both parties to allow intervention at all, stating that the delay from an evidentiary hearing would be "intolerable" and would "jeopardize" the Fire Department's "ability to function." I submit that the majority ignores the clear directives of this Circuit and the Supreme

Court in *Retarded Citizens* and *United Air Lines*. The court below should have considered only the prejudice the parties might suffer from the two weeks that lapsed before appellants filed their motion. I reiterate my view that a broad assessment of prejudice in the context of intervention as of right improperly collapses the distinction between this form of intervention and permissive intervention.

In my view, the existing parties can show no prejudice from a delay of two weeks. I note that appellants filed their motion within the period set for class members to object. In *United Air Lines*, the Supreme Court decided that a comparable delay in filing was not prejudicial:

> The motion to intervene was filed *less than three weeks* after the 'settlement' was incorporated in the District Court's final judgment. . . . There is no reason to believe that in that short period of time, [the existing parties] discarded evidence or [were] otherwise prejudiced.

432 U.S. at 393, n.14, *quoted in Stallworth* v. *Monsanto Co.*, 558 F.2d at 267. (citations omitted, emphasis added). Furthermore, the consent decree was not yet etched in stone on April 25, 1980, the day on which it was preliminarily approved and posted. The appellants filed their motion within the fifteen-day period set for comment and objection by class members. Both parties anticipated that the union might object to the decree within this time. I must therefore assume that intervention by the union was a distinct possibility that all parties recognized, including the court. These facts undermine the conclusion that the parties would have been prejudiced by intervention. The record shows that all parties contemplated objections and anticipated delay.

The District Court erred in two other respects. First, the District Court failed to examine whether, and to what extent, appellants would be harmed should intervention be denied. The court summarily concluded that the decree "*does not*

necessarily trammel the interests of non-minorities in promotion." Without more, we are left to speculate whether the court implicitly found that appellants would not be harmed. I believe, in this respect, the court's analysis is fatally deficient.

Second, the District Court did not consider special circumstances militating either for or against a finding of timeliness. In my view, one factor strongly supports appellants' motion: the limited role they wish to play as intervenors. They did not object to entry of the decree, nor did they try to delay the proceedings. They merely asked to participate in fashioning an equitable system for future promotions that would not shift the entire burden of compensation to white firefighters. Given this limited role, I cannot ignore the possibility that appellants' participation could have helped all parties in shaping a better remedy. Intervention at the remedial stage of complex litigation is often particularly appropriate, because it can provide a court with information necessary for an informed judgment. As Judge Robinson observed in *Hodgson* v. *United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir. 1972): "Timeliness presents no automatic barrier to intervention in post-judgment proceedings *where substantial problems in formulating relief remain to be resolved.*" (emphasis added). *See also Cascade Natural Gas Corp.* v. *El Paso Natural Gas Corp., supra; EEOC* v. *AT&T*, 506 F.2d 735 (3rd Cir. 1974); *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir. 1950). The majority fails, in my view, to appreciate the importance of post-judgment intervention when difficult remedial problems are presented.

In *United States* v. *Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972), a pollution abatement action in which fifteen groups and individuals moved to intervene, the court praised multi-party intervention as a means of shaping the most suitable remedy:

> Assuming that the end result which the United States is seeking is an abatement of pollution of Lake Superior

> by Reserve Mining Company, the Court must assume that there is more than one method of achieving that abatement. If the environmental groups [seeking intervention] maintain an interest in a specific form of abatement, which they feel will better protect their asserted interests, the Court should be willing to hear such evidence, if the best possible judgment is to be rendered. It must be remembered that this litigation is narrowly confined to one particular discharge, by one particular company, and that additional evidence as to alternative methods of abatement, in the event pollution should be proved, will be in the light of the alleged injury of minimal cost and inconvenience to the parties to the lawsuit, but will necessarily lead to a more informed decision by this Court on the merits of the controversy.

Id. at 418-19.

In *Liddell* v. *Caldwell*, *supra*, the Eighth Circuit revised a lower court's ruling that a 24(a)(2) motion was untimely. Six black students and the St. Louis NAACP filed their motion three years after the District Court had publicly invited all interested parties to intervene in the St. Louis desegregation litigation. At the time the applicants moved to intervene, the court had already approved a consent decree, which had taken years to construct. The Court of Appeals, in reversing, noted that: "the petitioner's primary purpose in seeking intervention relates to their objections to the proposed remedy, that is, to the ultimate plan of desegregation." 546 F.2d at 771. Because the issues were complex, and equitable remedies difficult to fashion, the Eighth Circuit remanded the case, directing the lower court to allow intervention, and suggesting that it invite others to intervene, including the U.S. Department of Justice and the State Board of Education.

In my view, the circumstances of this case are just as complex as those in *Reserve Mining* and *Liddell*, and the task of shaping equitable relief just as difficult. The District Court acted irresponsibility in dismissing the appellants' suggestions

for alternative relief, commenting that it "would not be a party to this constructive promotion bit . . . well, that's no way to run a fire department. . . ." Although I would reserve judgment on the merits of any alternatives advanced in this case, I think that at the very least the appellants deserved the opportunity to adduce information about alternative remedies.

Had intervention been granted in this case, limited to a hearing describing and defending alternative promotional plans, the District Court could have resolved the merits of the proposals in short order, with little or no delay. Such a course of action was taken in *Newburgh Area Council, Inc.* v. *Board of Educ.*, 489 F.2d 925 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated upon remand*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). In that case we ordered the District Court to integrate the Jefferson County, Kentucky school system. On remand, the District Court implemented its own desegregation plan, after finding the parties' proposals inadequate. At this advanced stage of the proceedings, the elected county chief executive officer, Jefferson County Judge Hollenbach moved to intervene under Rules 24(a) and (b) for the limited purpose of proposing an alternative desegregation plan. The existing parties objected strenuously. Nevertheless, the court granted conditional intervention, limited to an offer and defense of an alternative plan.

Hearings were held subsequently and the Hollenbach proposal was rejected. On May 18, 1976, the County Judge was dismissed as an intervenor. This action was affirmed and the County Judge's appeal was dismissed by order of this court on March 11, 1977. *Haycraft* v. *Hollenbach*, No. 76-2205, *cert. denied*, 434 U.S. 930 (1977). The Hollenbach case is germane to the present dispute for several reasons. First, it establishes that post-judgment intervention is timely and appropriate in complex cases affecting numerous and divergent interests. Second, it underscores the validity of allow-

ing unrepresented interested parties to advance and explore alternative remedies. Third, it illustrates the speed with which issues raised by intervenors can be resolved. The County Judge had his day in court — an opportunity to present expert witnesses in defense of his plan. Based on the evidence and its view of the merits of the plan, the District Court rejected the intervenor's alternative and dismissed him from the case. The entire issue was resolved in less than one month: the alternative plan was submitted on April 22, 1976; the matter was heard and rejected on May 4, 1976; and the intervenor was dismissed. Ultimately, the intervenor was ordered to pay the parties' attorneys fees incurred in objecting to his proposal. In the interim, the court-ordered plan continued in effect and the operation of the school system was not disrupted.

The course of subsequent events in the present case also tips the scale in favor of intervention. We heard this appeal together with an appeal on the merits of the *Stotts* litigation,[6] challenging a recent modification of the 1980 decree. Today this court affirms modification of the Decree.[7] The class representatives sought a preliminary injunction prohibiting the Fire Department from using a "last hired-first fired" formula to lay-off employees, in response to an announcement made early in 1981 that the City of Memphis planned to lay-off active personnel because of fiscal problems. The City intended to implement this lay-off policy by measuring seniority on a City-wide basis. Under the plan, those employees in danger of elimination who had sufficient seniority could choose to be demoted rather than laid-off.

On May 4, 1981, the District Court temporarily restrained the Department from laying off or demoting blacks occupying certain positions within the Department. On May 5, 1981,

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[6] Appeal Nos. 81-5348, 81-5349.

[7] *Stotts* v. *Memphis Fire Department*, Nos. 81-5348, 5349 (6th Cir. ———, 1982).

the firefighters' Union intervened by consen of the parties, asserting that lay-offs must be made according to city-wide seniority, as provided by the union's memorandum of understanding with the City. After additional hearings, the court issued a preliminary injunction prohibiting use of any lay-off policy that would decrease the percentage of blacks employed in eleven job categories. The District Court's injunction rested in part on the conclusion that the City's seniority system was not bona fide because of its discriminatory effect.

It is clear from these events that the Memphis Fire Department litigation has an ever-widening impact on non-minority employees. The consent decree has been modified — an extraordinary remedy — to reach employment practices that the original settlement did not encompass. No provision was made in either the 1974 or the 1980 decree for lay-off procedures, rank reductions, or demotions. The union has been allowed to intervene to contest the effect that the modified decree will have on its memorandum of understanding. I think appellants should have the opportunity to present and protect their interests, in light of the fact that the decree has been substantially modified. The need for intervention becomes acute when a court exercises its supervisory powers to alter a consent decree. *See Bolden* v. *Pennsylvania State Police*, 578 F.2d 912 (3rd Cir. 1978) (Garth, J. concurring in part, dissenting in part); *United States* v. *Reserve Mining Co.*, *supra*.

In *Penick* v. *Columbus Educ. Assn.*, 574 F.2d 889 (6th Cir. 1978), we affirmed denial of a motion for permissive intervention made by "CEA", the bargaining unit for the Columbus, Ohio public school teachers. Applicants filed their motion at the remedial stage of school desegregation proceedings. We deemed the application to be permissive, governed by Rule 24(b), because CEA did not show that the Columbus School Board did not adequately represent its interests. We noted:

> We would emphasize that the District Court has not required specific specific contract adjustments or staff assignments to be included in the desegregation plan, although the possibility that some court action might be necessary in the future has not been foreclosed. The thrust of the District Court's decisions . . . has been to encourage negotiation and accommodation of the Board with all interested persons and groups, without the direct involvement of the court. In these circumstances it appears that the DEA has not specifically suggested any interests which have been or are likely to be harmed by the court's disposition of the litigation.

Id. at 890. We were careful in *Penick*, however, to state that intervention by CEA at a future time *might be required* should circumstances change:

> [I]n view of the fact that the District Court has retained jurisdiction over the case and may conceivably find it necessary in the future to make court-ordered adjustments and assignments of faculty and staff, our decision is reached without prejudice to the right of the CEA to seek intervention at a later date should it become apparent that CEA interests are not being adequately represented in further proceedings before the District Court.

Id. at 891. *See also EEOC* v. *AT&T*, *supra*. I believe that *Penick* stands for the proposition that intervention must be considered and should be allowed in the face of further proceedings which substantially alter the parties' relationship. *Penick* is the law of this Circuit. Thus, even though the majority decides today that appellants' original application was untimely, changed circumstances should compel consideration of appellants' current need to intervene, without reference to the time the suit began.

I would reverse the judgment of the District Court and remand for entry of an order granting appellants' motion for leave to intervene.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARL W. STOTTS, Plaintiff, VS. MEMPHIS FIRE DEPARTMENT, et al., Defendants.	)	CIVIL ACTION NO. C-77-2104
FRED L. JONES, Plaintiff, VS. MEMPHIS FIRE DEPARTMENT, et al., Defendants.	)	CIVIL ACTION NO. C-79-2441-M

CONSENT DECREE

The plaintiffs Carl W. Stotts and Fred L. Jones filed their complaints in this action on February 16, 1977 and June 19, 1979 against the Memphis Fire Department and other City of Memphis officials, alleging that the defendants are engaged in a pattern or practice of

discrimination in hiring and promotions on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq., as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); 42 U.S.C. §1981 and 42 U.S.C. §1983.

The parties wish to avoid the delay and expense of contested litigation and desire to insure that any disadvantage to minorities that may have resulted from past hiring and promotional practices be remedied so that equal employment opportunity will be provided to all.

The Court has jurisdiction over the parties and subject matter of this action.

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 4-25-80.

The parties, by agreeing to the issuance of this order, waive a hearing

and findings of fact and conclusions of law on all issues raised by the complaints, and the parties have mutually agreed to the entry of this Consent Decree. Defendants, by entering into this Consent Decree, do not thereby admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaints.

The Court having been fully advised and informed of the facts and circumstances, and good cause appearing therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I.

EFFECT OF THE CONSENT DECREE

This Decree is entered into as a settlement of an existing dispute between plaintiffs and defendants as to

appropriate and valid procedures for the hiring and promotion of Fire Department personnel for the City of Memphis. It also provides for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of blacks. This Consent Decree satisfies and resolves all claims of plaintiffs and the class they represent of racial discrimination with respect to those matters set forth in the complaints and the previous orders of this Court.

This Decree is not intended to conflict with any provisions of the Consent Decree entered into on November 24, 1974 between the United States of America and the City of Memphis in Civil Action No. 74-286; rather this Decree is intended to parallel and supplement the relief provided in that Consent Decree.

Both plaintiffs and the class they represent shall seek no further relief for

the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief.

Plaintiffs agree that this Consent Decree is fully binding individually and on the class they represent. Defendants agree that this Consent Decree is fully binding on each of them, each of their officers, agents, employees and successors, and all other persons acting in concert with them who have notice of this Decree.

II.

CLASS CERTIFICATION

Plaintiff Stotts brought this action as a class action, and in its order of May 4, 1978, the Court certified the plaintiff class. For purposes of this Decree, the Court hereby adopts the class

description set forth in that order with modifications as follows:

> The class in this case consists of all incumbent black employees of the Memphis Fire Department, all those black employees who will be employed there in the future, and all black persons who have been denied employment with the Memphis Fire Department since March 24, 1972.

This action was brought, insofar as is relevant to this section of the Decree, on the basis of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq., as amended, and 42 U.S.C. §§1981 and 1983. For purposes of this settlement alone, and for no other purposes, the Court is satisfied that the above class should be and hereby is certified as proper under Federal Rule of Civil Procedure 23(b)(2) for injunctive, declaratory and back pay relief, and under Federal Rule of Civil Procedure 23(b)(3) for purposes of recovery of compensatory or punitive damages, if any.

III.

GENERAL

1. Defendants are compelled by law and by entering into this Consent Decree acknowledge their obligation to, and agree that they shall, refrain from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, the Memphis Fire Department because of such individual's race or color. Defendants in addition acknowledge their duty under law to, and agree that they shall, refrain from discrimination at any time on the basis of race in hiring, promotion, upgrading, training, assignment or discharge or otherwise discriminating against an individual employee or applicant for employment with respect to compensation,

terms and conditions or privileges of employment because of such individual's race. The City shall take reasonable steps to assure that no member of the Fire Department interferes with the enforcement of this decree by any means. The acknowledgments set forth in this paragraph do not create a right or rights in any person or groups of persons to seek relief under this Decree for defendants' failure to comply with their general legal obligations as described in this paragraph, except for conduct which constitutes a pattern or practice of unlawful discrimination on the basis of race.

2. In the event the entry of this Consent Decree generates, either through intervention or separate, collateral lawsuits, attacks on the appropriateness or sufficiency of any of the provisions contained herein, to include actions claiming entitlement to damages against

the City as a result of the ordering of any of the affirmative relief contained in this Decree, the parties hereto agree and warrant that they shall defend the lawfulness of any provision or provisions so attacked. If any such collateral lawsuit arises in state court against the City, it shall seek to remove such action to the Federal District Court.

IV.

SELECTION PROCEDURES

3. The City shall continue to develop and reassess its present affirmative recruitment program to inform minorities of job opportunities with the Memphis Fire Department. In filling vacancies in the entry level positions, the City shall continue to emphasize recruitment from among qualified members of the affected class, as provided in the Consent Decree in CA-74-286.

4. The City may maintain their current or similar education standards and selection procedure for firefighters, provided, however, that these standards and procedures do not have an adverse impact on members of the affected class as measured by compliance with the interim hiring goal set out in paragraph 7 below. If such impact is shown, the City must demonstrate the job relatedness of the particular education standard or selection procedure.

5. The City may continue to use on a pass-fail basis (or other grading system authorized by the U.S. Department of Justice provided that no adverse racial impact is present) written promotional examinations for the Fire Department. However, the City shall evaluate these examinations and promotional testing procedures to insure that the use of these examinations will not have an

adverse impact on black applicants. The parties agree that adverse impact will be shown if the adverse differential in the failure rate for blacks is in excess of five (5) percent. The City shall maintain records of the results of all such examinations sufficient to determine the impact on black applicants and shall provide this information to plaintiffs' attorney at the same time as the information is submitted to the United States Department of Justice in accordance with the Consent Decree in CA-74-288.

The City also agrees that it will administer promotional examinations on a regular basis, but in any event, at least every two years. The City shall notify plaintiffs' counsel of plans to administer promotional examinations as soon as practicable after the decision has been made on such plans.

V.

GOALS

6. The purpose of this decree is to remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks and continuing the efforts made in the City in hiring and promotions under the consent decree entered in CA-74-286. In achieving that purpose, it is the intent of the parties to work within the arrangements established between the Department of Justice and the City of Memphis in that consent decree. In that regard the parties agree that the long term goal established in this decree shall be that set forth in CA-74-286, viz. that the goal shall be to raise the black representation in each job classification in the fire department to levels approximating the black proportion of the

civilian labor force in Shelby County. Goals established herein are to be interpreted as objectives which require reasonable, good faith efforts on the part of the City, and not as rigid quotas.

7. Hiring: The City shall, in meeting the long term goal for black employees, establish and attempt to meet an interim goal, in entry level classifications where the long term goal has not been met, of filling on an annual basis at least 50% of all vacancies with qualified black applicants. Based on the experience with prior academy classes, the parties expect that the interim hiring goal above will be met both at time of initial appointment and successful completion of academy training. If any classes of firefighters hired pursuant to this order experiences a disproportionate rate of attrition among black firefighters, the parties shall meet

promptly to determine the reason therefor, and to discuss methods for remedying the unbalance so that achievement of the long-term goal can be facilitated.

8. Promotion: To insure as quickly as practicable the attainment of its long range goal, the City agrees to the following interim goals, subject to the availability of qualified applicants:

(a) The City adopts the goal of promoting Black applicants to positions above the rank of private or other entry level job classification in proportion to their representation in the qualified applicant pool for each uniformed rank or civil service classification. The parties agree to a goal of promoting blacks in the proportion of at least 20% for each civil service classification or uniformed-rank as measured on an annual basis; the parties recognize that the number of blacks qualified for a particular job rank

or classification may be a relevant factor in measuring the City's compliance with these goals. Nothing in this paragraph or Decree should be construed in such a way to require the promotion of the unqualified or the promotion of the less-qualified over the more qualified as determined by standards shown to be valid and non-discriminatory as set forth in the Uniform Guidelines on Employee Selection Procedure, 28 C.F.R. 50.14.

(b) During periods when acting positions are available, these non-permanent assignments from the next lower rank in the uniformed force shall be based on experience and demonstrated ability, for the position to which the employee shall be assigned and, consistent with the foregoing, reasonable efforts shall continue to be made to give leadership experience to eligible blacks.

VI.

SPECIFIC RELIEF

9. Promotions: The promotions listed in Exhibit A to this Decree shall become effective upon the entry of this decree. The conditional promotions shall become effective upon fulfillment of each condition listed in Exhibit A.

10. Monetary Relief: The parties to this Decree have agreed that the aggregate monetary relief in this case shall be $60,000 of which all shall be considered back pay. This money shall be awarded pursuant to the amounts listed in Exhibit B with the City to prepare individual checks within 15 days (or as soon as practical utilizing good faith efforts) of the final entry of this decree and delivered to plaintiffs' counsel for distribution. All persons who receive monetary relief herein shall execute a

release in the form attached as Exhibit C as a condition of payment.

VII.

REPORTING

11. The City shall maintain and retain during the period of this decree necessary records to support the implementation of this decree which shall be the same records kept for implementation of the Consent Decree in CA-74-286. These records shall be made available to the plaintiffs' counsel for inspection and copying upon written request and where applicable subject to an appropriate protective order.

To avoid conflicts with the Attorney General's continuing monitoring and compliance efforts pursuant to the Consent Decree in CA-74-286, the parties agree to the following provisions:

(a) The City will furnish to Plaintiffs' counsel copies of all reports relating to the Fire Division made to the Attorney General pursuant to the Consent Decree in CA-74-286.

(b) Should any dispute or controversy arise concerning the Defendants' application of, or adherence to, the provisions of this decree, Defendants' and Plaintiffs' counsel shall confer with the Attorney General and seek a mutually agreeable resolution of the dispute.

(c) Should voluntary efforts to resolve the dispute or controversy fail, Plaintiffs' counsel may then petition the Court for redress or resolution.

12. The City will maintain the following records:

(a) All applications and related records for all persons seeking employment or promitions with the Memphis

Fire Department and shall include on such applications identification of the applicant by race. The records retained shall include, where applicable, copies of tests administered and the test results.

(b) All written communications between the City and applicants for both initial entrance, transfer and promotion.

13. At the times established for such reports to the Attorney General in CA-74-286, the City shall report to plaintiffs' counsel the following information:

(a) A summary showing the total number of employees by race in each job classification of the Memphis Fire Department.

(b) A list of all newly hired employees indicating the name, race, and job classification of each since the last report was filed.

(c) A list of all persons, by job classification, to whom promotion has been offered and whether or not that promotion has been accepted.

(d) A breakdown of the applicant flow of the Memphis Fire Department by race which indicates the number of applicants by race, rejected and pending for each job classification. A person is considered an applicant for this purpose upon filing a formal application when a job is posted and upon meeting the minimum qualifications for the position.

(e) A list of all promotions, name, race, and date of hire of the employee promoted and the date of the promotion.

14. The City shall provide counsel for the plaintiffs a copy of each of the following documents relating to the Fire Division at the times established for

reporting to the Attorney General pursuant to the Consent Decree in CA-74-286:

(a) each eligibility list for hiring or promotion to any rank in the department identifying each individual on said list by name and race;

(b) each new or revised job description or classification;

(c) notice of the filling of vacancy in any uniformed or non-uniformed position within the Fire Department including the name and race of the person selected.

VIII.

MISCELLANEOUS

15. Attorneys' Fees and Costs. The City shall pay counsel for plaintiffs, attorneys' fees and costs in the amount of $_____ in settlement of all claims by said counsel for attorneys' fees from

the commencement of this action to the entry of this Decree and such amount shall be paid within 15 days of the final entry of this Decree. (The parties have followed the recommendation of Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) and will begin to negotiate the possible settlement of fees and costs after the Court's preliminary approval of this Consent Decree.)

16. If any provision is this Decree causes a result unintended by all the parties or an ambiguous interpretation, the aggrieved party shall notify the other parties and the Attorney General by mail of the unintended result or ambiguous interpretation. The parties shall have 30 days after the date of such letter to resolve the problem. If the parties are unable to reach agreement within such 30 days, the issue may be submitted to the Court for resolution.

17. The Court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree.

18. Notice. The Court hereby gives its tentative approval to this Consent Decree, subject to the notification of class members and the provision of an opportunity for them to file objections. The text of the notice to be is set forth in Exhibit D. This notice shall be posted at each firehouse or other Bureau facility of the Fire Department for a period of 15 days beginning April 28, 1980, and mailed to each identified class member listed in Exhibit B on that date. Class members who file written objections within this period shall be entitled to be heard on their objections at a hearing before this Court on May 16, 1980. If no written objections are filed within the 15 day period, this Consent Decree shall

become final without further action by the Court.

ENTERED, this _____ day of April, 1980.

UNITED STATES DISTRICT JUDGE

APPROVED:

RICHARD B. FIELDS
RATNER & SUGARMON

ATTORNEYS FOR PLAINTIFFS

CLIFFORD D. PIERCE, JR.
EDWARD R. YOUNG
J. DANIEL MORGAN

ATTORNEYS FOR DEFENDANTS

EXHIBIT A

Immediate Promotions:

A. Fire Inspector
Curtis Richmond
William Carter
John Cooper
Raymond McGahee
Fred Jones

B. Deputy Fire Marshall
Norvell Wallace

C. Driver
Willie Taylor

D. Fire Prevention Supervisor in Inspection
Clarence Howard

E. Metro Arson Squad Inspector
Grafton Logan

Conditional Promotions:

A. Emergency Unit Lieutenant
Robert Young may have the next opening

B. District Chief
Carl W. Stotts when he passes the District Chief's Test

C. Firefighting Captain
Ben Lewis when he passes the Captain's Test

D. Maintenance Mechanic
Fred Walton may have the next opening when available upon receipt of diesel mechanic certification.

EXHIBIT B

RANK AS OF 1-31-80	NAME	D.O.E.	YEARS AS OF 2-9-79	BACK PAY AWARD
Dr.	Percy Alexander	1-02-73	6	450.00
Pvt.	John Alsobrook	9-30-74	4	300.00
Dr.	Chester Anderson	6-05-72	6	450.00
Lt.	James Arnold, Jr.	8-10-71	7	525.00
Lt.	Gus Bailey	6-05-72	6	450.00
Pvt.	Alexander Banks	4-20-72	6	450.00
Dr.	Terrold Bilbrew	9-24-73	5	375.00
Lt.	Leon Bowen	10-1-68	11	825.00
Pvt.	Richard Burns	7-11-55	23	1,725.00
Pvt.	William Carter	7-11-55	19	1,425.00
Dr.	Ray Cobb	10-23-70	8	600.00
Lt.	Sherman Cole	12-13-65	13	975.00

Pvt.	John Cooper	7-11-55	23	1,725.00
Dist. Chief	Robert J. Crawford	7-11-55	23	1,725.00
Pvt.	James Daniel	9-30-74	4	300.00
Dr.	Jesse Dorsey	7-16-68	10	750.00
Lt.	Robert L. Downey	6-05-72	6	450.00
Pvt.	Lorenzo Duckett, Jr.	9-30-74	4	300.00
Lt.	George W. Dumas	7-11-55	16	1,200.00
Lt.	Willie M. Flowers	3-17-69	9	675.00
Dr.	Robert Freeman	1-02-73	5	375.00
Pvt.	Willie A. Guinn	9-05-72	6	450.00
Lt.	Dewey R. Harris	6-05-72	6	450.00
Pvt.	Johnny B. Harrison	9-05-72	6	450.00
Dr.	Joseph A. Hodges	10-30-72	6	450.00
Insp.	Clarence Howard	5-01-69	9	675.00

Pvt.	Don J. Hulbert	11-03-69	9	675.00
Dr.	Willie L. Jefferson	10-30-72	6	450.00
Pvt.	Edwin W. Jeffery, Jr.	1-02-73	5	375.00
Lt.	Jesse Jones, Jr.	6-28-71	7	525.00
PM	Ulysses Jones, Jr.	1-02-73	6	450.00
Dr.	William L. Kegler	10-30-72	6	450.00
Lt.	Ben Lewis	12-13-65	13	975.00
Lt.	James I. Lewis	9-05-72	6	450.00
Lt.	Raymond A. Lewis	6-05-72	6	450.00
Pvt.	Grafton M. Logan	7-21-73	7	525.00
Lt.	Lawrence L. Lum	10-05-64	14	1,050.00
Lt.	John L. Malone	1-02-73	6	450.00
Pvt.	Raymond N. McGahee	6-05-72	6	450.00
Dr.	Quincy D. McKay	6-05-72	6	450.00

P.M.	Larry L. McKissick	1-02-73	6	450.00
P.M.	Leon Moore	6-05-72	6	450.00
Dr.	Lloyd T. Moore	7-01-68	10	750.00
Lt.	Robert H. Moore, Jr.	6-05-72	6	450.00
Dr.	Ronald Moore	9-24-73	5	375.00
Pvt.	Spencer L. Moore	10-30-72	6	450.00
Dr.	Malcolm A. Nelson	9-05-72	6	450.00
Dr.	Eddie R. Newson	1-02-73	6	450.00
Capt.	Floyd E. Newsum, Sr.	7-11-55	18	1,350.00
Dr.	E. L. Parsons	7-11-55	23	1,725.00
Lt.	Nathaniel Partee	8-22-70	8	600.00
Dr.	Andrew Patton	9-2.-73	5	375.00
Lt.	Rozelle Payton	9-04-67	11	825.00
Pvt.	Steve Payton, Jr.	3-22-72	6	450.00

Lt.	Sterling Phillips	3-24-68	12	900.00
Pvt.	John A. Pierce	1-02-73	6	450.00
P.M.	John W. Powell	8-07-72	6	450.00
Lt.	Matthew Profit	7-16-68	10	750.00
Lt.	Herbert C. Redden	5-01-69	9	675.00
Dr.	Elbert N. Rich	10-30-72	6	450.00
Pvt.	Curtis L. Richmond	10-30-72	6	450.00
Lt.	John D. Riley	10-01-68	10	750.00
Lt.	Archie Sanders, Jr.	3-7-68	12	900.00
Lt.	Archie L. Scruggs	11-03-69	9	675.00
Dr.	Bennie J. Shields	1-02-73	6	450.00
Lt.	Rickey C. Tate	10-30-72	6	450.00
Pvt.	Roscoe Tate	9-24-73	5	375.00
Pvt.	Willie L. Taylor	8-25-69	9	675.00

Pvt.	Fred H. Walton	1-02-73	6	450.00
Capt.	Norvell E. Wallace	7-11-55	23	1,725.00
Pvt.	Billy J. Warren	10-30-72	6	450.00
Pvt.	R. D. Williams	11-03-69	9	675.00
Dr.	Jerome Woods	9-05-72	6	450.00
Pvt.	Lee R. Woods	1-02-73	6	450.00
EMT	Lawrence E. Yates	7-11-55	23	1,725.00
P.M.	Robert Young	6-05-72	6	450.00
Alarm III	Virgie Watson	2-18-74	4	300.00
Clerk-Typist	Joyce Fitzpatrick	10-15-73	5	375.00
Steno-grapher	Felicia Adair	5-6-74	4	300.00
	CARL W. STOTTS			4,425.00
	FRED L. JONES			4,425.00

EXHIBIT C

NOTICE TO BLACK
EMPLOYEES OF THE
MEMPHIS FIRE DEPARTMENT

This Notice is to inform you that these lawsuits have been settled, and to inform you of your rights under the settlement and of the opportunity for you to file objections to the settlement.

These lawsuits were filed by two incumbent black firefighters to challenge alleged racial discrimination in hiring and promotion in the Memphis Fire Department. These lawsuits are not just on behalf of the original plaintiffs, but is also on behalf of the following groups of persons:

> All incumbent black employees of the Memphis Fire Department, all those black employees who will be employed there in future, and all black

persons who have been denied employment with the Memphis Fire Department since March 24, 1972

This settlement involves a number of changes in the hiring and promotional practices of the Memphis Fire Department. It also provides for a back pay award of $60,000 to be distributed on the basis of seniority and an award of attorneys' fees and costs. Individual promotions and back pay awards are attached to this Notice.

If you would like to see a copy of the complete terms of the settlement, copies are available for you to examine at:

Memphis Fire Department Headquarters

65 S. Front Street

City of Memphis Personnel Office

125 N. Main, Room 18-23

Clerk of the U.S. District Court
167 N. Main, Room - 950

You may also get a copy of the complete settlement for yourself by writing or calling:

Mr. Richard B. Fields, Attorney
RATNER & SUGARMON
525 Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

If you have any objections to the settlement, they must be filed in writing with the Clerk of the U.S. District Court, 167 North Main, Room 950, Memphis, Tennessee, 38103, by the close of business, May 12, 1980. Objections received after that date will not be considered.

If no objections are filed, the Consent Decree will automatically go into

effect in 15 days. If there are objections, the Court will have a hearing on May 16, 1980 at 2:00 P.M. at the Federal Building, 167 N. Main, 11th Floor, Courtroom No. 1.

If you have any other questions contact Mr. Fields at the above address.

EXHIBIT D

RELEASE

For and in consideration of the payment to the undersigned of the sum of $_____ dollars, receipt of which said sum is hereby acknowledged, the undersigned hereby releases and discharges the City of Memphis, all agents, employees, departments, commissions, commissioners, and officers thereof of and from all action, causes of action, damages, claims and demands, made

or which could have been made, in law or in equity, of every kind and character, including any and all claims for back pay, damages or other relief provided for under 42 U.S.C. §§1981 and 1983 and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, et seq.), which resulted from the hiring, promotional or other employment practices of the Memphis Fire Department, which was made the subject of litigation in the cases of Carl W. Stotts v. Memphis Fire Department, No. 77-2104, and Fred Jones v. Memphis Fire Department, No. 79-2441, and all damages heretofore sustained, or hereafter to be sustained by reason of said employment practices, and all claims arising out of said employment practices, whether known or unknown, suspected or unsuspected.

It is further understood that this settlement is a compromise of a disputed

claim and that the payment is not to be construed as an admission to liability on the part of the City of Memphis or any of its agents, employees, department, commissions, commissioners or officers, by whom liability is expressly denied.

IN WITNESS WHEREOF, the undersigned have hereunto set their hands this _____ day of _____, 19___.

_____ _____

(WITNESS) (NAME)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARL W. STOTTS, ET AL VS. MEMPHIS FIRE DEPT., ET AL	CIVIL ACTION NO. C-77-2104
FRED L. JONES, VS. MEMPHIS FIRE DEPT., ET AL,	CIVIL ACTION NO. C-79-2441-M

HEARING ON
MOTION TO INTERVENE
APRIL 25, 1980

THE COURT: All right. The court denies the motion to intervene. In doing so, I will make very brief observations. We will file a written ruling on the motion, and I would think that it would be final as far as this case is concerned -- may be the grounds for appeal. But, in any event, I think in any kind of lawsuit one of the things you have to decide,

whether it is a motion to intervene or add an additional party -- one of the factors is whether it is going to delay the relief that will be achieved by trial or settlement or whatever it is, and this case has had a good bit of impact on the Fire Department. I have issued some injunctive relief that the City has -- that has caused the City to appear in court and assert to the court that necessary promotions in the Fire Department were being held up because of this litigation, which goes to the functioning of it, and also I think that there is a good bit of value to be obtained, certainly as far as the minority people, of going ahead and getting this thing over with.

Now, I don't care when we do it. Somebody is going to be unhappy. And I would not be a party to any of ths constructive promotion bit. That's not

much good for anybody. And it is certainly not good -- well, that's no way to run a fire department, and to create more top jobs is no solution. I think this relief is only a goal to be attempted, and it's not any iron-clad requirement, and I think it is long overdue. I don't believe it would be right to let someone come in at the last minute and interfere with the implementation of this. I might also observe that I think the provisions of the consent decree are reasonable, and, therefore, on the merits I see no great need to let somebody intervene, reopen this, start bringing in experts, and I don't see how in the world any fair program that compensates for past failure to promote minorities -- well, there is no fair way to do it that doesn't keep the majority from losing some spots. That's the reason they had the system in

the first place, so the minorities wouldn't get in there, and you are just perpetuating the system, or certainly it appears to be. So I will enter an order denying the motion to intervene.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARL W. STOTTS et al,

Plaintiffs,

vs. NO. 77-2104

MEMPHIS FIRE DEPARTMENT
et al,

Defendants.

FRED L. JONES,

Plaintiffs,

vs. NO. 79-2441-M

MEMPHIS FIRE DEPARTMENT
et al,

Defendants.

ORDER DENYING MOTION
TO INTERVENE

Carl W. Stotts, an employee of the Memphis Fire Department, filed a class action suit challenging the hiring and promotion policies of the Memphis Fire Department on February 16, 1977. Fred L. Jones filed an individual suit against

the Memphis Fire Department on June 19, 1979, alleging employment discrimination. The two suits were consolidated.

Jurisdiction exists in this Court pursuant to 42 U.S.C. §§1981, 1983, and 2000e et seq.

The class consists of all incumbent and future black employees of the Memphis Fire Department and black employees who have been denied employment since March 24, 1972. The plaintiffs and defendants agreed upon a tentative settlement and a proposed consent decree was submitted to this Court for approval. The Court ordered the decree posted in various locations of the Fire Department with a notice that class members would be bound by the decree unless they filed objections by May 12, 1980. No objections were filed by class members. However, a group of non-minority employees of the

Fire Department filed a motion to intervene in these suits on May 12, 1980. This Court heard oral argument on the motion on May 16, 1980, and at that time denied the motion to intervene. The Court issues this written ruling in accordance with the Court's oral pronouncement.

NATURE OF THE MOTION

Eleven non-minority employees of the Fire Department moved to intervene in these cases on behalf of themselves and all other non-minority employees of the Fire Department. They seek intervention of right pursuant to F.R.Civ.P. 24 as "defendants and cross-plaintiffs" (sic), and certification as a separate class under F.R.Civ.P. 24. They deny any responsibility for any alleged discrimination perpetrated on plaintiffs and other minority employees by the Fire

Department. They agree with the provisions of the Consent Decree in all respects except for the provision relating to promotions. They allege that the proposed Consent Decree will have an adverse impact on the promotional opportunities and expectations of presently employed non-minority Fire Department personnel. See Affidavit of Dr. Sylvia Joure, Industrial Psychologist.

The prospective intervenors assert that the present parties do not represent their interests. They allege that, by means of the negative impact on them as a result of the operation of the proposed Consent Decree, the Fire Department is attempting to shift responsibility for its alleged discriminatory actions to non-minority employees. The only immediate relief sought by the intervenors is delay in approval of the

promotions provision of the Consent Decree until a study of the adverse impact of that provision can be made. After such a study, this group alleges that it would be in a position to aid in constructing a promotions remedy that would not have an adverse impact on non-minority employees.

DISCUSSION

The motion to intervene is not timely because of the length of time these cases have been pending. Additionally, all promotions have been stayed since December 5, 1979, when this Court entered a temporary restraining order on promotions. This Court is of the opinion that the proposed intervenors have been on notice of the pendency of these actions at least since that time.

The intervenors state that until the recent posting of the proposed Consent

Decree they were not aware of any possible adverse impact on them. This Court finds that the intervenors adopted a "wait-and-see" posture with respect to this litigation, and have waited too long to come foward. It would be unfair and inequitable to postpone any longer the long overdue relief accorded to the plaintiffs and class members herein by the Consent Decree.

Additionally, this Court finds the Consent Decree to be reasonable, consistent with the policy of the Civil Rights Act, and an effective remedy for past discrimination[1] which does not necessarily trammel the interests of non-minorities in promotion. See Detroit Police Officers v. Young, 608 F.2d 671 (6th Cir. 1979).

---

[1]While the existence of such past discrimination is not admitted by the Fire Department, the Court does not deem this material in view of the settlement agreed to by the parties.

This Court would be remiss in performing its duty if it did not approve the Consent Decree in these cases. See United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980). Unfortunately, some adverse impact may result any time corrective action is undertaken. In the present case, the Court notes, the Consent Decree provides only for promotional goals. It does not provide quotas nor does it dictate the promotion of less qualified employees. Thus, the present case is clearly distinguished from Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

It is so ORDERED. ENTER, This _____ day of May 1980.

ROBERT M. McRAE, JR., JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARL W. STOTTS, et al,

Plaintiffs,

vs. NO. 77-2104

MEMPHIS FIRE DEPARTMENT,
et al,

Defendants.

FRED L. JONES,

Plaintiff,

vs. NO. 79-2441-M

MEMPHIS FIRE DEPARTMENT,
et al,

Defendants.

D. L. ORDERS; W. L. WILKINSON;
JACKIE PARMINTER; WARNER C.
USELTON, JR.; JACK PRESGROVE;
HAROLD WALLACE; HARVEY JENKINS;
FRED E. PERSON, JR.; PRESTON
LEE DUNN; CHARLEY JONES; JOHN W.
BLANTON; For Themselves and All
Other Non-Minority Employees of
the Memphis Fire Department,
Similarly Situated,

Intervenors.

ORDER DENYING STAY
PENDING APPEAL

In this cause the Caucasian petitioning-intervenors desire an appeal of this Court's denial of their last-minute attempt to interfere with the settlement of this cause. A Notice of Appeal has been filed with regard to the denial of the Petition to Intervene. Those persons now seek a stay of certain promotions to black Fire Department officers.

It appearing to this Court that the promotion of black Fire Department officials is long overdue in this community, and therefore that the stay should not be granted,

IT IS THEREFORE ORDERED that the Motion for Stay Pending Appeal is hereby denied.

ENTER: This _____ day of June 1980.

ROBERT M. McRAE, JR., JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARL W. STOTTS,

Plaintiff

vs. CIVIL ACTION NO. C-77-2184

MEMPHIS FIRE DEPARTMENT, et al,

Defendants.

FRED L. JONES,

Plaintiff,

vs. CIVIL ACTION NO. C-79-2441-M

MEMPHIS FIRE DEPARTMENT, et al.,

Defendants.

ORDER

Upon the motion of plaintiffs for further injunctive relief in this case regarding the interpretation of the defendants' duty to promote blacks in the Memphis Fire Department, and after an evidentiary hearing conducted on June 18, 1982, the Court finds:

1. Paragraph 8 of the 1980 Consent Decree reads in relevant part as follows:

> 8. Promotion: To insure as quickly as practicable the attainment of its long range goal, the City agrees to the following interim goals, subject to the availability of qualified applicants:
>
> (a) The City adopts the goal of promoting Black applicants to positions above the rank of private or other entry level job classification in proportion to their representation in the qualified applicant pool for each uniformed rank or civil service classification. The parties agree to a goal of promoting blacks in the proportion of at least 20% for each civil service classification or uniformed-rank as measured on an annual basis; the parties recognize that the number of blacks qualified for a particular job rank or classification may be a relevant factor in measuring the City's compliance with these goals. Nothing in this paragraph or Decree should be construed in such a way to require the promotion of the unqualified or the promotion of the less-qualified over the more qualified as determined by standards shown to be valid and non-discriminatory as set forth

in the Uniform Guidelines on Employee Selection Procedure, 24 C.F.R. 50.14.

2. The "at least 20%" goal contained in paragraph 8(a) of the Consent Decree must be interpreted to be applied separately to each classification and not as an overall goal, and the City's compliance with the goals of the Consent Decree is to be measured on an annual basis of July 1 through June 30.

3. Since the Consent Decree was approved and entered on April 25, 1980, various problems and factors have delayed the establishment of a new register setting forth the persons qualified to be promoted in the various classifications. None of these problems or factors was deliberately created or caused to defeat compliance with the interim goals set forth in the decree. Therefore the Court finds that there is no basis for ordering the defendants to "catch up" in the

current fiscal year (1981-82) for failure to comply with 20% promotions overall for prior years.

4. After the current register was established and the Review Boards had graded the eligible candidates for promotions, the defendant Director made selections for 33 authorized promotions. The proposed promotions by number and race are as follows:

	Proposed Promotions		Eligible	
	Black	White	Black	White
Deputy Chief	0	1	1	2
District Chief	1	6	2	30
Captain	3	10	17	109
Lieutenants	3	9	23	371

5. In the rank of deputy chief there is one qualified black and in the rank of district chief there are only two qualified blacks. They must be appointed in this round of promotions in order to satisfy the "at least 20%" goal. The

remainder of the promotions meet the goal.

6. Defendants have not properly acknowledged the "at least" 20% promotional goal, and this goal must be applied to each job classification in future promotions as measured on an annual basis.

7. Although Fire Director Smith has not deliberately discriminated against blacks in his promotional selection procedure, the selection method which he used is too subjective to pass the test of validity under the Uniform Guidelines and Employee Selection Procedure, 24 C.F.R. 50.14.

8. Neither the plaintiffs nor this Court can tell the defendants how many promotions to make each year unless it is shown that they are deferring promotions in order to defeat the purposes of the Consent Decree.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the City is enjoined from proceeding with the 33 promotions unless the qualified black candidate for deputy chief and the other qualified candidate for district chief be included in the promotions proposed by the City. IT IS FURTHER ORDERED that the additional injunctive relief sought by Plaintiffs is denied.

ENTER: This _____ day of June 1982.

ROBERT M. McRAE, JR., JUDGE

FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

D. L. OSBORN, *et al.*,

Petitioners,

v.

CARL W. STOTTS, *et al.*, and
MEMPHIS FIRE DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS M. DANIEL*
COX & FIELDS
707 Adams
Memphis, Tennessee 38105
(901) 525-8601

JACK GREENBERG
O. PETER SHERWOOD
CLYDE E. MURPHY
RONALD L. ELLIS
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents

* Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 1

STATEMENT OF THE CASE 1

ARGUMENT: REASONS FOR DENYING THE WRIT 4

I. The Sixth Circuit's Holding Is Consistent With The Decisions Of This Court and with The Decisions of Other Circuits 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:	Page
Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 142 (1944)	9
City of St. Louis v. United States, 452 U.S. 938 (1981).....	6
Commonwealth v. Rizzo, 530 F.2d 501 (3d Cir.) cert. denied sub. nom. Fire Officers Union v. Rizzo, 426 U.S. 921 (1976)	5
Detroit Police Officers Assoc. v. Young, 608 F.2d 671 (6th Cir. 1979) cert. denied, 452 U.S. 938 (1981)	7
Edmondson v. State of Nebraska, 383 F.2d 123, 128 (8th Cir. 1967)	9
Farmland Irrigation Co. v. Dolplmaier, 220 F.2d 247 (9th Cir. 1955)	9
Firebird Society v. Bd. of Fire Commissioners, 66 F.R.D. 457 (D. Conn.), aff'd, 515 F.2d 504 (2nd Cir.), cert. denied, 432 U.S. 867 (1975)	6
Firefighters Institute v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), cert. denied sub. nom. City of St. Louis v. United States	6

Page

Fire Officers Union v. Rizzo, 426 U.S. 921 (1976) 5

PMC Corp. v. Keizer Equip. Co., 433 F.2d 654 (6th Cir. 1970) 9

Hawaii-Pacific Venture Capital Corp. v. Rothbard, 564 F.2d 1343 (9th Cir. 1977) 9

Korioth v. Briscoe, 523 F.2d 1271, 1278 n. 24 (5th Cir. 1975) 9

Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir. 1969) 9

Mendenhall v. Allen, 346 F.2d 326, 328 (7th Cir. 1965) 9

Philadelphia Elec. Co. v. Westinghouse Elec. Corp., 308 F.2d 865, 861 (3d Cir. 1962) cert. denied, 372 U.S. 936 8

Reich v. Webb, 336 F.2d 1353 (9th Cir. 1964), cert. denied, 380 U.S. 915 9

Stotts v. Memphis Fire Department, 679 F.2d 541, 546-560 (6th Cir. 1982) 4

Talbert v. Richmond, 648 F.2d 925 (4th Cir. 1981), cert. denied, 50 U.S.L.W. 3547 (Jan. 11, 1982) 7

Page

Union Cent. Life Ins. Co. v. Hamilton Steel Prods. Inc., 374 F.2d 820, 824 (7th Cir. 1967) 9

United Steelworkers v. Weber, 443 U.S. 193 (1979) 6

Woburn Decreasing Co. of New Jersey v. Spencer Kellogg & Sons, Inc., 3 F.R.D. 7, 10 (W.D.N.Y. 1943) 9

Statutes:

28 C.F.R. 50.14 3

42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended ..... passim

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-204

D. L. ORDERS, et al.,

Petitioners,

v.

CARL. W. STOTTS, et al., and
MEMPHIS FIRE DEPARTMENT, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the attempt of eleven proposed intervenors to delay and otherwise prevent the implementation of a consent decree, and whether the district court's opinion denying that intervention was an abuse of discretion.

On February 16, 1977, respondent Carl W. Stotts filed a class action lawsuit challenging the hiring and promotion policies of the City of Memphis Fire Department as racially discriminatory. Following three years of discovery and negotiations, the lawsuit was settled by the entry of a consent decree. The decree was preliminarily approved and subsequently posted for comment on April 25, 1980. Neither class members nor members of the firefighter's union, filed objections to the decree. On May 12, 1980, eleven non-minority firefighters filed a motion to intervene, objecting to the decree's minority promotion goals.

On May 16, 1980 the district court conducted a hearing to consider the motion to intervene. Following that hearing the court rejected the alternative remedial action proffered by the intervenors, and ruled that the decree was reasonable. Additionally, the court denied the motion to intervene on the ground that it was untimely.

The promotional provision objected to by the white firefighters is as follows:

> 8. Promotion: To insure as quickly as practicable the attainment of its long range goal, the City agrees to the following interim goals, subject to the availability of qualified applicants:
>
> (a) The City adopts the goal of promoting black applicants to positions above the rank of private or other entry level job classification in proportion to their representation in the qualified applicant pool for each uniformed rank or civil service classification. The parties agree to a goal of promoting blacks in the proportion of at least 20% for each civil service classification or uniformed rank as measured on an annual basis; the parties recognize that the number of blacks qualified for a particular job rank or classification may be a relevant factor in measuring the City's compliance with these goals. Nothing in this paragraph or Decree should be construed in such a way to require the promotion of the unqualified or the promotion of the less-qualified over the more qualified as determined by standards as set forth in the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 50.14.

Pet. App. 52-53[1/] [2/]

REASONS FOR DENYING THE WRIT

The judgment below affirmed the district court's denial of intervention by white firefighters objecting to a temporary promotional goal as part of a comprehensive consent decree entered into on May 17, 1980. The ruling below, therefore, presents the follow-

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1/ "Pet. App." refers to the separately presented appendix filed by the petitioners. The history of this litigation is also found in the companion case Stotts v. Memphis Fire Department, 679 F.2d 541, 546-560 (6th Cir, 1982).

2/ The long term goal of the Consent Decree is "to raise the black representation of each job classification in the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." Pet. App. 50-51. This is the same goal as contained in a 1974 consent decree between the City of Memphis and the United States Justice Department. Stotts, supra, 679 F.2d at 571. In 1979, blacks constituted between 33 and 37 percent of the Memphis population, yet the Fire Department was only 10 percent black and blacks were virtually excluded in supervisory ranks. See hiring and promotional data, 679 F.2d 550, 578-79.

ing question:

> Whether the district court abused its discretion in denying intervention by eleven white firefighters to attack a temporary promotional goal for black employees in the the Memphis Fire Department?

I. The Sixth Circuit's Holding Is Consistent with The Decisions of This Court and with The Decisions of Other Circuits.

The Court of Appeals has written an extensive opinion that fully considers all the factors weighed by the district court in denying intervention and approving the promotional goal as reasonable. This Court has denied review to white firefighters and their representatives seeking to intervene in remedial proceedings where goals were ordered for black employees. See, Commonwealth v. Rizzo, 530 F.2d 501 (3d Cir.), cert. denied sub. nom. Fire Officers Union v. Rizzo, 426 U.S. 921 (1976). Indeed, review has been denied in cases where similar promotional goals have been adopted as part of the reme-

dial scheme in correcting past discrimination in municipal fire departments. See Firefighters Institute v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), cert. denied sub. nom., City of St. Louis v. United States, 452 U.S. 938 (1981) (promotion ratio of one black firefighter for each two white firefighters); Firebird Society v. Bd. of Fire Commissioners, 66 F.R.D. 457 (D. Conn.), aff'd, 515 F.2d 504 (2nd Cir.), cert. denied, 432 U.S. 867 (1975) (7 of 28 lieutenant positions were designated for blacks). White intervenors and/or employee unions participated in the liability and remedy stages of litigation in both of these cases and were unable to provide alternatives to numerical goals.

Petitioners also argue that the promotional goal conflicts with this Court's ruling in United Steelworkers v. Weber, 443 U.S. 193 (1979), because it necessarily infringes upon

the promotional opportunities of white employees. This argument is unpersuasive in that post-Weber voluntary affirmative action programs in cities with significant minority populations have been approved by appellate courts and review has been denied by this Court. Detroit Police Officers Assoc. v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); Talbert v. Richmond, 648 F.2d 925 (4th Cir. 1981), cert. denied, 50 U.S.L.W. 3547 (January 11, 1982).[3/]

3/ The district court and the court of appeals fully considered the Weber standards and determined that the decree was proper:

> The decree was reasonably related to correcting the underutilization of minorities in the Memphis Fire Department. The decree did not require the discharge of non-minority employees and only encompassed qualified minorities. Moreover, the decree is temporary and does not constitute an absolute bar to the advancement of non-minorities. More importantly, the court has retained jurisdiction to effectuate the purposes of the decree while not unduly trammeling the interests of

Clearly the district court did not abuse its discretion in denying intervention to whites who challenge a reasonable consent decree that comports with standards approved by this Court and the lower circuits for voluntary affirmative action.

Moreover the district court here neither erroneously denied nor abused its discretion in denying the petitioners' motion to intervene. Philadelphia Elec. Co. v. Westinghouse

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3/ continued

of non-minorities.

679 F.2d at 556.

Between July 1980 and June 1982, 72 promotions were made in the Fire Department with only 4 promotions received by blacks because the promotional register was depleted of qualified blacks at that time. On June 29, 1982, the district court ordered the Fire Department to promote the First black to the rank of deputy chief and one black to district chief in addition to 7 other black promotions. Pet. App. 89-94. A total of 33 promotions were made as a result of that order with 9 awarded to blacks. For the two year period from July 1980 to July 1982, therefore, blacks received 13 of 105 promotions or 12.4%.

Elec. Corp., 308 F.2d 865, 861 (3rd Cir. 1962), cert. denied, 372 U.S. 936; Korioth v. Briscoe, 523 F.2d 1271, 1278 n. 24 (5th Cir. 1975); Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir. 1969); FMC Corp. v. Keizer Equip. Co., 433 F.2d 654 (6th Cir. 1970); Union Cent. Life Ins. Co. v. Hamilton Steel Prods. Inc., 374 F.2d 820, 824 (7th Cir. 1967); Mendenhall v. Allen, 346 F.2d 326, 328 (7th Cir. 1965); Edmondson v. State of Nebraska, 383 F.2d 123, 128 (8th Cir. 1967); Hawaii-Pacific Venture Capital Corp. v. Rothbard, 564 F.2d 1343 (9th Cir. 1977); Farmland Irrigation Co. v. Dolplmaier, 220 F.2d 247 (9th Cir. 1955); Reich v. Webb, 336 F.2d 1353 (9th Cir. 1964), cert. denied, 380 U.S. 915. See also, Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 142 (1944); Woburn Decreasing Co. of New Jersey v. Spencer Kellogg & Sons, Inc., 3 F.R.D. 7, 10 (W.D.N.Y. 1943).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
OCT 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-204

In the Supreme Court of the United States

October Term, 1982

D. L. ORDERS, W. R. WILKINSON, JACKIE PARMITER, WARNER C. USELTON, JR., JACK PESGROVE, HAROLD WALLACE, HARVEY JENKINS, FRED E. PERSON, JR., PRESTON LEE DUNN, CHARLEY JONES, JOHN W. BLANTON, FOR THEMSELVES AND ALL OTHER NON-MINORITY EMPLOYEES OF THE MEMPHIS FIRE DEPARTMENT, SIMILARLY SITUATED,
Petitioners,

vs.

CARL W. STOTTS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, FRED JONES AND MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS AND JOSEPH SABATINI,
Respondents.

BRIEF OF RESPONDENTS, MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS AND JOSEPH SABATINI, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals properly determine that the District Court had not abused its discretion in denying Petitioners' request to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW I
TABLE OF AUTHORITIES III
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 4
ARGUMENT 4
CONCLUSION 8

TABLE OF AUTHORITIES

Cases Cited

NAACP v. New York, 413 U.S. 345 (1973) 7
Stotts v. Memphis Fire Dept., 679 F.2d 579 (6th Cir. 1982) 4, 7
United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 5

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STATEMENT OF THE CASE

On February 16, 1977, Carl W. Stotts, an employee of the Memphis Fire Department, filed a class action suit pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000 e-5(f)(1), 42 U.S.C. §1981 and 42 U.S.C. §1983, challenging the hiring

and promotion policies of the Memphis Fire Department. On May 4, 1978, the United States District Court for the Western District of Tennessee certified the case as a class action, defining the class as:

> all black employees of the Memphis Fire Department from March 24, 1972, until the present, all those black employees who will be employed there in the future, and all black persons who have been denied employment with the Memphis Fire Department since March 24, 1972.

On the same date, the Court denied a motion to intervene filed on behalf of a group of black employees of the Memphis Fire Department.

On June 19, 1979, Fred L. Jones filed an individual action against the Memphis Fire Department alleging that he had been denied a promotion on August 30, 1976, due to racial discrimination. On September 18, 1979, that action was consolidated with the Stotts class action, because of the common issues of law and fact.

During the pendency of this action, extensive pretrial activity took place. Interrogatories, motions to compel discovery, motions to dismiss and for summary judgment were filed. Some thirteen (13) depositions were taken. An application for a temporary restraining order and preliminary injunction were filed. On December 5, 1979, pursuant to Plaintiffs' motion for temporary restraining order and preliminary injunction, the District Court granted a temporary restraining order enjoining promotions in the Fire Prevention Bureau of the Memphis Fire Department.

Trial was set on six (6) different occasions for the following dates: August 30, 1978, May 7, 1979, October 9, 1979, November 14, 1979, February 27, 1980 and June 25,

1980. Pursuant to these trial settings, a joint pre-trial order was approved by the District Court and entered on September 17, 1979.

Additionally, the parties engaged in extensive settlement negotiations through the course of this litigation, and on April 25, 1980, the parties presented to the District Court a proposed Consent Decree resolving the dispute. At that time, the Court gave its preliminary approval to the Decree. Notices of the proposed Decree were posted in all firehouses for a period of fifteen (15) days, with copies being available to whomever wanted them. During this fifteen (15) day period, class members were provided the opportunity to file written objections to the Decree with the Clerk's office.

On May 16, 1980, the District Court met to determine if any objections had been received concerning the proposed Consent Decree. The Court was advised at that time that no objections had been made. However, on May 12, 1980, over three (3) years after the filing of the lawsuit, a motion to intervene as Defendants and Cross-Plaintiffs was filed on behalf of eleven (11) non-minority employees of the Memphis Fire Department, Petitioners herein.

On May 16, 1980, the District Court heard arguments concerning the motion to intervene and denied Petitioners' motion. At that time, the Court approved and entered the proposed Consent Decree without objection by the Petitioners. Subsequently, on May 23, 1980, the Court entered an Order more fully setting forth its reasons for denying the motion for intervention.

On June 6, 1980, a notice of appeal was filed on behalf of the eleven (11) non-minority employees of the Fire Department. On this same date, the above employees

also filed a motion for stay pending the appeal which was denied by the Court by its Order dated June 9, 1980.

On May 7, 1982, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, finding that the lower Court had not abused its discretion in ruling that the motion to intervene filed by the non-minority firemen was untimely. *Stotts v. Memphis Fire Dept.*, 679 F.2d 579 (6th Cir. 1982). Petitioners herein now seek a review of that decision.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The decision below is fully consistent with the well-established legal principles governing intervention and does not evidence a conflict among the Court of Appeals or a departure from the rulings of this Court.

ARGUMENT

Petitioners do not assert that the decision of the Sixth Circuit creates a conflict among the Circuits regarding the standards to be applied by a district court in determining whether intervention should be permitted. Rather, Petitioners request this Court to review the opinion below for the purposes of more clearly defining the line of demarcation between permissible and impermissible affirmative action plans and of establishing a new rule governing intervention in employment discrimination cases. The decision below, however, does not present the appropriate basis for consideration of these issues.

Petitioners contend that the Sixth Circuit's denial of their application for intervention prior to the judicial ap-

proval of a consent decree necessitates further explanation by this Court regarding permissible affirmative action plans under *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). This issue is not before the Court. In *Weber*, the Court explicitly confined its decision to a very narrow issue: the voluntary adoption of affirmative action plans by private parties. Judicially approved or mandated affirmative action plans, as present herein, were not a subject of the Court's opinion. Thus, Petitioners' attempt to seek review of the decision below, based upon *Weber*, is in error.

Moreover, even if the Sixth Circuit decision denying intervention can be interpreted as approving a voluntary affirmative action plan, the terms of the Consent Decree questioned by Petitioners do not deviate from the guidelines enunciated in *Weber* relating to permissible affirmative action plans. Petitioners contend that the affirmative action provisions of the consent decree "unnecessarily trammels the interests of white employees" and, therefore, is impermissible under *Weber*. Although Petitioners conveniently refer to the oft-cited language in *Weber* and request clarification, Petitioners fail to acknowledge the subsequent language of the Court pertaining to the operation of the judicially approved Kaiser program. After defining the bounds over which a permissible affirmative action plan cannot transgress, the Court in *Weber* examined the plan before it and found it to be within the allowable confines, stating:

> The plan does not require the discharge of white workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. (citations omitted).

Id. at 208.

Applying the Court's reasoning to the case at hand, it is clear that the provisions of the Consent Decree, even if considered a voluntary affirmative action plan and subject to *Weber*, are permissible. The provisions to which the Petitioners object (and to which their attempts of intervention were directed) provide that the Respondents would adopt the goal of promoting black applicants to positions within the Fire Department in proportion to their representation in the qualified applicant pool, but at minimum, a goal of twenty percent (20%) minority promotions is sought to be attained. However, the goals are not rigid quotas as the number of blacks qualified for a particular classification is recognized as a relevant factor in measuring compliance, and the Decree does not require the promotion of unqualified or less-qualified over more qualified employees (Section V, Goals, ¶8(a), Petitioners' App. 52-53). As evidenced by the express language of the Decree, the affirmative action provisions do not require the discharge or demotion of white employees and their replacement with new black promotees. Nor does the Decree create an absolute bar to the advancement of white employees. Thus, the affirmative action provisions of the Consent Decree do not evidence a conflict with this Court's opinion in *Weber* or the necessity for further explanation of that decision.

Petitioners' second basis for review is equally without merit. Petitioners would have the Court formulate a new rule providing non-minority employees with an absolute right to intervene in any employment discrimination litigation involving potential class-wide relief. Respondents submit that Petitioners' request is unnecessary as the long-established law governing intervention is well-founded and was properly applied by the Court below.

The undisguised issue before the Court is reduced to whether the District Court abused its discretion in deny-

ing Petitioners' request to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. This issue was presented to the Sixth Circuit which held that the lower court properly acted within its discretion. Respondents submit that the question of possible abuse of discretion in denying intervention is not of such special or overriding importance to warrant review.

This Court has clearly established that a crucial factor in determining intervention under Rule 24 is the timeliness of the party's request for intervention. *NAACP v. New York*, 413 U.S. 345 (1973). There, the Court held: "Timeliness is to be determined from all circumstances. And to be decided by the court in its exercise of sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *Id.* at 366. The courts below followed this Court's teaching in *NAACP* in reaching their conclusions that Petitioners' application for intervention was untimely. Furthermore, the decisions do not suggest that the District Court abused the discretion afforded it under the Federal Rules.

In the decision below, the Sixth Circuit examined five (5) factors in reaching its conclusion that Petitioners' application for intervention was untimely, including: (1) the purpose for which intervention was sought, (2) the length of time preceding the application for intervention during which the proposed intervenors knew, or reasonably should have known, of their interest in the case, (3) the prejudice to the original parties due to the proposed intervenors' failure to apply properly for intervention, (4) the existence of unusual circumstances militating against or in favor of intervention, and (5) the point to which the suit had progressed. *Stotts v. Memphis Fire Dept.*, 679 F.2d at 582. In applying the known facts to the above enumerated factors, the Court properly determined that

the District Court did not abuse its discretion in holding that Petitioners' application for intervention was untimely. Thus, review of the lower court's ruling in this case is not warranted, and the facts in this case, as presented by Petitioners, do not suggest that an "absolute right" of intervention in employment cases is needed.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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